In The

Supreme Court of the United States

October Term, 1977

No. 77-84

MICHAEL SMITH, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, WENDELL G. DAVIS, and WOODROW WILSON ROBBINS,

Appellants,

—v.—

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; WILLIAM A. DEESE, JR., Chairman thereof, and IRWIN BELK, VICTOR S. BRYANT, HUGH CANNON, PHILIP G. CARSON, JULIUS CHAMBERS, T. WORTH COLTRANE, WAYNE A. CORPENING, DR. HUGH DANIEL, JR., JACOB H. FROELICH, JR., DANIEL C. GUNTER, GEORGE WATTS HILL, LUTHER H. HODGES, MRS. HOWARD HOLDERNESS, DR. WALLACE HYDE, WILLIAM A. JOHNSON, JOHN R. JORDAN, JR., ROBERT B. JORDAN, III., MRS. JOHN McCAIN, REGINALD McCOY, HUGH MORTON, J. AARON PREVOST, LOUIS T. RANDOLPH, JOSEPH J. SANSOM, JR., HARLEY SHUFORD, JR., M. A. SLOAN, DR. E. B. TURNER, DAVID J. WHICHARD, III, THOMAS J. WHITE, JR., GEORGE D. WILSON, and GEORGE M. WOOD, Members thereof; WILLIAM CLYDE FRIDAY, President of the University of North Carolina; THE NORTH CAROLINA EDUCATION ASSISTANCE AUTHORITY; STAN C. BROADWAY, Executive Director thereof; and CHARLES F. GEORGE, JR., J. RUSSELL KIRBY, ROGER GANT, JR., VICTOR E. BELL, JR., EDWIN C. BAKER, MRS. CARRIE W. HARPER, WILLIAM H. PLEMMONS and BURKETTE RAPER, Members of the Board of Directors thereof; BELMONT ABBEY COLLEGE, INC.; and PFEIFFER COLLEGE, INC.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE WESTERN DISTRICT OF NORTH CAROLINA – CHARLOTTE DIVISION

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Appellants, Michael Smith, Americans United for Separation of Church and State, Wendell G. Davis, and Woodrow Wilson Robbins, respectfully pray for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINIONS BELOW

The District Court issued majority and concurring opinions on March 30, 1977. The opinions have not been reported, and are reprinted at pages A-1 through A-25 of the Appendix.

JURISDICTION

Appellants, Plaintiffs below, contend that North Carolina General Statutes, §§ 116-19 through 116-22, and §§ 116-201 through 116-209.22; North Carolina 1975 Session Laws, Chapter 875 §§ 30 and 36; and North Carolina 1975 Session Laws, Second Session, Chapter 983 § 56, as administered, are laws respecting an establishment of religion in contravention of the First and Fourteenth Amendments. The

complaint prayed for injunctive and declaratory relief against the defendants all.

Jurisdiction was conferred on the district court by 42 U.S.C.§1983 and the First and Fourteenth Amendments to the United States Constitution for declaratory and injunctive relief and 28 U.S.C. §§ 1331 and 1343. A three judge district court was convened pursuant to 28 U.S.C. § 2281.

The Honorable J. Braxton Craven, Jr., late of the Fourth Circuit Court of Appeals, was originally assigned to the three judge panel. However, after hearing the oral argument in the case he found that he had a conflict and withdrew by order dated December 16, 1976 and filed December 17, 1976, reprinted in the Appendix at pages A-31 through A-36. Chief Judge Haynsworth then designated himself to fill the vacancy on the three judge court by order dated January 7, 1977, which is reprinted in the Appendix at pages A-37 through A-38.

Appellants filed their notice of appeal to this Court on May 16, 1977 in the United States District Court for the Western District of North Carolina, Charlotte Division, reprinted in the Appendix at pages 27 through 30.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1253.

STATUTES INVOLVED

The statutes involved are North Carolina General Statutes, §§ 116-19 through 116-22, 116-201 through 116-209.22; 1975 Session Laws, Chapter 875 §§ 30 and 36;

and 1975 Session Laws, Second Session, Chapter 983 § 56, reprinted beginning at page A-39 of the Appendix. A copy of the judgment is reprinted at page A-26.

QUESTIONS PRESENTED

1. Whether tuition and scholarship grants to students are aid to the college, and if so,

2. Whether such aid has the primary effect of advancing religion in the following respects:

   (a) The State's failure to guarantee that state and federal funds will not be used for sectarian purposes by the student; and

   (b) The State's failure to guarantee that state and federal funds will not be used for sectarian purposes after becoming part of the general funds of the college.

3. Whether the state may make tuition funds available to private non-public college students without making the same funds available to public college students?

STATEMENT OF THE CASE

North Carolina has three separate programs which channel state funds into tuition assistance for North Carolina residents attending independent colleges in North Carolina, including church-related colleges. The first two programs do not include those residents of the state attending colleges under public control, such as community colleges, and the University of North Carolina.

1. The first enactment in 1971 (N.C. G.S. § 116-19 et seq.) as amended, grants funds to private colleges including church-related colleges, based on the number of North Carolina resident students enrolled on a full time basis. The individual colleges must use the funds for scholarship assistance to financially needy North Carolina resident students.

The college must be accredited by the Southern Association of Colleges and Schools and must not be a "seminary Bible school, Bible college, or similar religious institution." By a 1975 amendment scholarships may be granted only for secular education, meaning that no scholarship may be given to a student who is pursuing an education leading to a vocation in religion. By amendment in 1976, each college must keep these funds in a separate account and must return to the state any funds which are unused for such scholarships.

When the funds are credited to the student's account they become an unidentified part of the general funds of the college and there is no restriction on the use between secular and sectarian purposes, either by statute or regulation.

There has been no attempt to restrict scholarships to secular subjects or to secular education by each student. The scholarship is credited to the student's account just as any other payment would be credited.

The principal officer of each college is required to submit a certification of

compliance to the Board of Governors; however, no requirement has been made for a post-year audit of the records of the college.

2. The second tuition grant program was enacted in 1975 as the 1975 Session Laws, Chapter 875, § 30. This statute provides for a direct grant of $200 for each North Carolina resident enrolled in a qualified college on a full time basis. The qualified college is the same as under the first program, and includes private church-related colleges but does not include public colleges or universities.

Each student must apply for the grant. The college certifies the eligibility of each student, and the state pays each college the sum of $200 for each eligible student enrolled at that college. No cash is remitted to the student,but each student receives a credit of $200 on his account and a notice of such credit stating the amount and source of the credit.

The statute provides that these funds may be used for secular education purposes only. This restriction is the same as in the first act, i.e., no student enrolled in a course of study leading to a vocation in religion is eligible.

As in the first act, there is no provision to restrict the funds to secular purposes after the funds are credited to the student's account, either by statute or regulation.

There has been no attempt to restrict scholarship to secular subjects or to secular education. The scholarship is credited to the student's account just as any other payment would be credited.

3. The third program is a combination of state and federal funds provided under 20 U.S.C. § 1070C, et. seq., and 1975 Session Laws, Chapter 875, § 36.

Eligible students under this program must show substantial need and must be North Carolina residents and be enrolled in an approved college in the State of North Carolina, which in this case, includes private church-related colleges as in the first two programs, plus public colleges.

There appears to be no provision to restrict the use of these funds to secular use by the student in paying for his or her total education nor by the college after the funds are paid into the general funds of the college.

THE COLLEGES

The court found that the colleges in question (Belmont Abbey College and Pfeiffer College) were not so pervasively religious that their secular activities could not be separated from their sectarian ones, p.A-18, and further found at page A-19, that once the funds were credited to the student's account the monies were transferred to the general fund of the college without restriction. Then, at page A-20, the court stated:

> "The Scholarship and tuition grants with which we are concerned primarily benefit the eligible students and their families. It serves the state's secu-

lar purpose in assisting a North Carolina resident student to attend a private college of his choice. Since the schools here are not pervasively religious and the students receiving assistance are not preparing for a religious vocation, the grant of tuition and scholarship assistance to them is a secular use.

"Of course, the colleges receive a benefit from these funds. Without such funds they might have fewer students, be able to charge less tuition, or be forced to divert other resources to student aid. In either such event, the receipt of these funds may be said to free other college funds for sectarian purposes which, otherwise, might not be available. That however, is the precise reasoning which the Supreme Court held in Roemer was insufficient for First Amendment invalidation of the program."

The court below, at pages A-16-A-17, found the two colleges (Belmont Abbey and Pfeiffer College) indistinguishable from the colleges in Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337 (1976), and using the reasoning from Roemer, to then find that the tuition and scholarship programs primarily benefit the eligible students and their families, page A-20. Even in finding a benefit to the college due to the tuition and scholarship, the court below equated that to the benefit derived from releasing funds for sectarian purposes as in Roemer, pages A-20- A-21, and further found that the granting of unrestricted funds to the college under this program was

no different in result than the granting of restricted funds which would free other funds for sectarian purposes and further stated at page A-22 as follows:

> "Since a transfer of these funds to a restricted account would serve no useful practical purpose, it should be avoided, for policing the expenditure of such accounts would involve the state in the operation of the colleges to a greater extent than it now is. North Carolina is now 'entangled' in the operation of these colleges only minimally. It requires a minimum number of reports and certificates, and the audits it has conducted have been short and objective. A requirement that the college keep its books on a basis which would disclose the ultimate use of the funds, and the state's auditing those accounts, would be a substantial increase in the state's involvement. (Emphasis added.)

Following final judgment no further action was taken by the plaintiffs except to file a notice of appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

This Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) set forth a constitutional guide for legislation authorization for public aid to church-related schools:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . .; finally, the statute

must not foster 'an excessive government entanglement with religion.'"

This three-prong test was repeated and reaffirmed in Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337, 2345 (1976).

This Court in Roemer then went on to review the Court's experience with public aid to church-related schools and colleges and covered Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971) and Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973); Levitt v. Committee for Public Education, 413 U.S. 472, 93 S.Ct. 2814 (1973), and reached the conclusion that the slate is anything but clean, and stated that there was little room for refinement of the principles governing public aid to church-affiliated private schools.

> "Our purpose is not to unsettle those principles so recently reaffirmed, see Meek v. Pittinger, supra, or to expand upon them substantially, but merely to insure that they are faithfully applied in this case." 426 U.S. 736, 747, 96 S.Ct. 2337, 2348.

The aid challenged in Tilton was in the form of federal grants for the construction of academic facilities at private colleges, some of which were church-related with the restriction that such facilities not be used for sectarian purposes. This non-sectarian restriction was to last for 20 years; however, the Court could not approve the facilities' sectarian use even after 20

years, and therefore excised that time limit from the statute. 403 U.S. at 682-684, 91 S. Ct. at 2097-2099, and in Roemer, 426 U.S. 736, 745, 96 S.Ct. 2337, 2346 note 17.

The aid was approved for secular purposes only.

The aid challenged in Hunt v. McNair was also for construction of secular college facilities. Mr. Justice Blackmun set forth the requirement of Hunt at 426 U.S. 736, 96 S.Ct. 2337, 2349, thus:

> "Hunt requires (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded."

Again only secular activities or facilities were approved as constitutional.

The challenged aid in Roemer was non-categorical grants which went through two steps in a screening process to insure compliance with the statutory restrictions on grants:

> "None of the moneys payable under this subtitle shall be utilized by the institution for sectarian purposes." 426 U.S. 741, 96 S.Ct. 2352 (1976).

The Council for Higher Education in applying the screening process:

> "First, it determines whether an in-

stitution applying for aid is eligible at al, or is one 'awarding primarily theological or seminary degrees.' . . . Second, the Council requires that those institutions that are eligible for funds not put them to any sectarian use. An application must be accompanied by an affidavit of the institution's chief executive officer stating that the funds will not be used for sectarian purposes, and by a description of the specific nonsectarian uses that are planned. These may be changed only after written notice to the Council. By the end of the fiscal year the institution must file a 'Utilization of Funds Report' describing and itemizing the use of the funds. The chief executive officer must certify the report and also file his own 'Post-expenditure Affidavit,' stating the funds have not been put to sectarian uses. . . . ." (Emphasis added.) 426 U.S. 738, 96 S.Ct. 2339 (1976).

Again, only secular uses have been approved by this Court.

The Court below found the challenged institutions in this case were not distinguishable from those with which the Supreme Court dealt in Roemer, and were not "pervasively sectarian." (Page A-18.)

After this finding the Court stated in regard to the North Carolina General Assembly:

> ". . . it has imposed an express restriction that the funds be used only for secular educational purposes. . .,

> both the Board of Governors and the North Carolina Educational Assistance Authority take the position that grants of student aid in the form of scholarships and tuition credits, were themselves, secular purposes so long as the aided student in an eligible college was not in a program of study designed as preparation for a career in a religious vocation." Page A-19 (Emphasis added.)

The Court below felt that the plaintiffs below contended that Roemer was uncontrolling in this case. That was not the case, plaintiffs below did not agree that Roemer allowed tuition and scholarship grants to be treated as aid to students and only incidental aid to the institution as Roemer was interpreted by the Court below. See page A-20, where the Court quotes Roemer thus:

> "The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the state frees the institution's resources to be put to sectarian ends." 426 U.S. 736, 747; 96 S.Ct. 2337 (1976).

The Court found that the aid to the institution was incidental to the secular mission, page A-20, and stated:

> "The scholarship and tuition grants with which we are concerned primarily benefit the eligible students and their families. It serves the state's secular purpose in assisting a North Carolina resident student to attend a private college of his choice. Since the

schools here are not pervasively religious and the students receiving assistance are not preparing for a religious vocation, the grant of tuition and scholarship assistance to them is a secular use. (Emphasis added.)

Of course, the colleges receive a benefit from these funds. Without such funds they might have fewer students, be able to charge less tuition, or be forced to divert other resources to student aid. In either such event, the receipt of these funds may be said to free other college funds for sectarian purposes which, otherwise, might not be available. That, however, is the precise reasoning which the Supreme Court held in Roemer was insufficient for First Amendment invalidation of the program."

The concurring opinion of District Judge McMillan clearly states his belief that these programs would be contrary to the First Amendment were it not for Roemer. See concurring opinion, page A-23 - A-24.

The same applies to Chief District Judge Jones. See his letter of March 25, 1977, page A-25, to Chief Judge Haynsworth of the Fourth Circuit.

Does Roemer authorize this type of aid; we think not.

1. Whether tuition and scholarship grants to students are aid to the college.

In Lemon v. Kurtzman, 403 U.S. at 619, this Court emphasized that under the Establisment Clause a state may not allow its

funds to be used in whole or in part to aid the teaching of religion.

This Court said in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973) at 783:

> "The tutition grants here are subject to no such restrictions on religious use. There has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that state financial aid supports only the former.' Lemon v. Kurtzman, supra, 403 U.S. at 613, 91 S.Ct. at 2111. Indeed it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian." (Emphasis added.)

See also note 38 which states:

> "Allen and Everson differ from the present litigation in a second important respect. In both cases the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. See also Tilton v. Richardson, supra, in which federal aid was made available to all institutions of higher learning and Walz v. Tax Comm'n., supra, in which tax exemptions were accorded to all educational and charitable nonprofit institutions." (Emphasis added.)

The Court below took the position that tuition and scholarship grants are aid to the student and only incidental aid to the school.

The law is abundantly clear that such aid is in fact aid to the schools.

This Court in Nyquist appears to have rejected this conclusion and, in any event, stated at 413 U.S. 786, 93 S.Ct. 2972:

> "A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the District Court that '(w)hether he gets it during the current year, or as a reimbursement for the past year, is of no constitutional importance.' 350 F. Supp. at 668."

See also Almond v. Day, 197 Va. 419, 89 S.E. 2d, 851, 857 which stated in 1955:

> "Tuition and institutional fees go directly to the institution and are its very life blood."

The South Carolina Supreme Court invalidated a tuition program on State constitutional grounds, and although the Federal constitutional issue was not involved, the reasoning of the Court on the practical effects of such a plan is persuasive:

> "We reject the argument that the tuition grants provided under the act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the students, it is also of material aid to the institution to which it is paid." (Emphasis added.) Hartness v. Patterson, 255 S.C. 503, 507-508; 197 S.E. 2d 907, 909 (1971).

In Lemon v. Sloan, 340 F. Supp. 1356, 1364 (1972) Aff'd. 93 S.Ct. 2982, a three-judge United States District Court for the Eastern District of Pennsylvania invalidated on establishment grounds a Pennsylvania law which partially reimbursed parents for tuition payments made to private schools. It concluded that:

> "the effect of the Aid is to aid the schools. . . . Parents are eligible to receive payments under the Act because they have paid tuition at a non-public school. Tuitions are the 'very life blood of private educational institutions,' . . . because they are the source from which many educational services, secular as well as religious, are funded."

See also Weiss v. Bruno, 509 P.2d 973 (Wash. 1973) (finding Washington tuition grant program violative of State Constitution.)

As early as 1891, before the First Amendment had been made applicable to the

states, the South Dakota Supreme Court, in invalidating under the state constitution payment of tuition costs for pharmacy students at a religiously affiliated college, identified clearly the practical effect of tuition payments. Its reasoning on this point is worthy of note:

> "Is not the tuition received from every student for the benefit of or to aid the school, to support it, to strengthen it? Do not such institutions depend mainly upon the tuition fees of students they can obtain for their support? But the learned counsel strenuously contends that the sum due the college will not be contributed for the benefit of or to aid the university, but in payment for services rendered the state, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds?" Synod of Dakota v. State, 2 S.D. 366, 374; 50 N.W. 632, 635 (1891).

The soundness of this analysis of the effect of state paid tuition, made by these and other courts, is supported by the perception of the General Assembly. the tuition and scholarship grant programs were instituted with the expectation that they would, among other consequences, "encourage and assist private institutions to continue to educate North Carolina students. . . " (Em-

phasis added.) Article 22 § 116-19. Thus the General Assembly recognized that the private colleges themselves would and will be assisted by the availability of these tuition and scholarship grants for their students.

The question virtually answers itself --tuition and scholarship grants are a material aid to the institution.

2. Whether such aid has the primary effect of advancing religion in the following respects:

(a) The state's failure to guarantee that state and federal funds will not be used for sectarian purposes by the student.

It appears clear that no attempt is made to limit the payment for the secular portion of the student's education except to limit payment to those students not seeking a career in religion. However, it is equally clear that the payment of tuition to a college affiliated with a church or religion pays for the total educational pursuit of the student including the secular and sectarian alike. See Nyquist, supra. By allowing a student to pay for his total educational pursuit, which includes religious education in both a formal sense in a classroom and in an informal sense from the total surroundings of a church-related school, itself has the primary effect of advancing religion in general as well as a specific religion.

(b) The state's failure to guarantee that state and federal funds will not be used for sectarian pur-

poses after becoming part of the general funds of the college.

But more important than the fact that tuition payments for students actually aid the sectarian schools which they attend in general, it must be emphasized in the case at bar that the tutition funds finance and support specific religious instruction, proselytization, and worship at the schools. The state tuition payments go into the general operating accounts of the sectarian schools and are not segregated from tuition monies paid by non-state-supported students. The state funds are thus used to finance, in addition to the secular portions of the curriculum, its religious aspects. They pay for the salaries of Bible teachers, the costs of chapel programs and other worship services, the maintenance of buildings in which they are held, required religion courses, and other sectarian activities, thereby advancing religion.

In Wolman v. Essex, 342 F. Supp. 399 (1972), a three-judge District Court for the Southern District of Ohio, in invalidating an Ohio tuition reimbursement plan, recognized the potential for what may happen under the North Carolina tuition and scholarship grant programs:

> "Tuition forms the major part of a school's general fund and monies derived from it can be used for any purpose it deems legitimate. Such funds may be used for the construction of a chapel as well as a gymnasium, for the purchase of icons as well as laboratory test tubes."

The tuition and scholarship grant programs, as applied to sectarian schools, do precisely what the Constitution forbids. In Lemon v. Kurtzman, 403 U.S. at 612, the Court summarized the three main evils

> "against which the establishment clause was intended to afford protection: sponsorship, financial support, and active involvement in religious activity[2]

[2]The history and rationale of the establishment clause, an understanding of which is helpful, perhaps essential, in appropriately applying it, has been reviewed extensively by the Supreme Court on at least two occasions. In Everson, the principles and purposes underlying the establishment clause were thoroughly explored both by Justice Black, who wrote for the Court, and by Justice Rutledge, who authored a lengthy dissent. Their common conclusion was that the First Amendment erected a "wall of separation" between Church and State, and that any form whatsoever of financial support of a religious institution made a breach in that wall. Justice Frankfurter's concurring opinion in McCollum v. Board of Education, 330 U.S. 203 (1948), approved by Justices Jackson, Rutledge, and Burton, carried forward the historical study begun by Justice Rutledge in Everson. Justice Frankfurter showed how the Virginia conflict over state financing of religious teachers had been duplicated in state after state, as the newly developing system of public schools competed with older church schools for support by taxation. It was not out of hos-

tility to religion, but to avoid fierce sectarian strife, that public schools were disassociated from religious teaching and tax funds were denied to schools in which sectarian doctrine was taught. By 1875 the separation of public education from church entanglements 'was firmly established in the consciousness of the nation,' without federal compulsion. (Emphasis added.)

With private education now facing a severe financial crisis, however, pressures are once more building for public aid to private schools, the overwhelming majority of which are church-related. See Report of the President's Commission on School Finance (McElroy Commission), cited in Wolman v. Essex, 342 F. Supp. 399, 418 (E.D. Ohio 1972).

It is appropriate then to recall the warnings of the founding fathers. In the words of Thomas Jefferson, in the preamble to the Virginia Bill for Religious Liberty, 2 Papers of Thomas Jefferson, (Boyd Ed.) 545:

> Almighty God hath created the mind free, that all attempts to influence it. . . are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind yet chose not to propagate it by coercion on either. . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he

> would make his pattern. . ."

The Court below found that the funds were not restricted once received by the colleges, (pages A-19 - A-22), and further found that the colleges are not distinguishable from those in Roemer, (page A-18), ". . . we conclude that they are not so pervasively religious that their secular activities cannot be separated from their sectarian ones."

It appears clear that the challenged programs have the "primary effect" of advancing religion.

It must be emphasized that the "primary effect" test has evolved into a "substantial effect" test. In the application of the Establishment Clause by the United States Supreme Court in Committee for Public Education and Religious Liberty v. Nyquist, supra, the Court repeatedly referred to the "effect test" rather than the "primary effect test." The appellees, noting that the Court had used the phrase "principal or primary effect" in Lemon v. Kurtzman, contended that the Court would have to determine whether the "primary" effect of the New York tuition grant program was to subsidize religion or promote legitimate secular objectives. The Court, rejecting that interpretation of the "effect test," replied:

> "We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to

ascertain whether it also has the direct and immediate effect of advancing religion. . . Any remaining question about the contours of the 'effect' criterion were resolved by the Court's decision in Tilton, in which the plurality found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion.' 403 U.S. at 683, 91 S.Ct. at 2098, . . . Such secular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify. . . a direct substantial advancement of religion." (Emphasis added.) 93 S.Ct. at 2971 n.39; 37 L.Ed.2d at 969 n. 39.

Appellants thus need only demonstrate that the North Carolina tuition and scholarship grant programs have a substantial effect of aiding religion.

This position was reaffirmed in Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753 (1975) and again in Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337 (1976).

Mr. Justice Blackmun after restating the law as settled in previous cases stated at 2348:

"So the slate we write on is anything but clean. Instead, there is little

room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed, see Meek v. Pittenger, supra, or to expand upon them substantially, but merely to insure that they are faithfully applied in this case." (Emphasis added.)

When we analyze the nature of the institutions receiving public funds in the form of tuition and scholarship grants for their students, we are told by the Board of Governors that in the years 1972 through 1975 the forty (40) schools listed by the Board of Governorsas receiving such monies are all religiously affiliated institutions. The grants in the first two (2) programs are not available to any but private non-public institutions. Thus, both in practice and potential the only schools which will be benefited by public payment of their students' tuition and scholarship grants are religious institutions.

We must conclude therefore that the granting of unrestricted funds to an institution affiliated with a church has - at least - a substantial effect of aiding religion.

3. Whether the state may make tuition funds available to private, non-public college students without making the same funds available to public college students or all students alike?

Allen and Everson differ from the present litigation in a second important respect. In both cases the class of benefi-

ciaries included all school children, those in public as well as private schools.

Even if one accepts arguendo the proposition that it is the student who receives the payment, the constitutional defect is not cured. The "child-benefit theory" used by appellees owes its origin to Everson v. Board of Education, 330 U.S. 1 (1947), in which the Supreme Court, 5-4, upheld state reimbursement of transportation costs for children attending private schools as it also did for public school children. In Board of Education v. Allen, 392 U.S. 236 (1968), the Court also upheld a New York statute requiring the state to loan secular textbooks to all students, some of whom attended parochial schools. The case at bar is easily distinguished from those cases, and the child-benefit theory is inapplicable to tuition grants. In construing precedents on the Establishment Clause, the Supreme Court in Lemon v. Kurtzman, 403 U.S. at 66-67, noted:

> "Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. (Emphasis added.)

This language has been interpreted to mean that challenged aid, to be permissible, must be both (1) secular, neutral, or non-ideological and (2) given in common to all students. See, e.g., Public Funds for Public Schools of New Jersey v. Marburger, 358 F.

Supp. 29 (1973), in which a unanimous three-judge panel invalidated a state program providing for $10-20 reimbursements to parents of school children for their purchase of secular textbooks because the program, although neutral or non-ideological, was available only to the parents of students attending private schools, 85% of which were church-related.

The first two programs challenged here fail the test in Everson and Allen as set forth in Marburger. The aid is not given in common to all students, the primary effect therefore is the advancement of religion at least for those schools which are church-affiliated.

This Court reaffirmed the principles of Committee for Public Education v. Nyquist and Lemon v. Kurtzman in its most recent case, Wolman v. Walter, Slip opionion 76-496, p. 5., decided June 24, 1977:

> ". . . nonetheless, the Court's numerous precedents 'have become firmly rooted,' Nyquist, 413 U.S. 761, and now provide substantial guidance."

CONCLUSION

The foregoing plainly demonstrates that this Court has jurisdiction of this appeal, and that the questions presented are substantial.

Respectfully submitted,

James W. Respess
Attorney for Appellants

Walter H. Bennett, Jr.
Of Counsel

A P P E N D I C E S

A-1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
No. C-C-76-131

Michael Smith, et al.,

Plaintiffs,

versus

Board of Governors of the
University of North Carolina,
et al.,

Defendants.

THREE-JUDGE COURT

Heard December 1, 1976
Decided March 30, 1977

Before HAYNSWORTH, Chief Circuit Judge,
JONES, Chief District Judge, and
McMILLAN, District Judge

Walter H. Bennett, Jr. and James W. Respess, for Plaintiffs; Rufus L. Edmisten, Attorney General for State of North Carolina, and James Wallace Jr., Assistant Attorney General for the Defendant, Board of Governors of the University of North Carolina; William L. Rikard, Jr. and Joseph W. Grier (Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston), and Basil L. Whitener, for the Defendant, Belmont Abbey College; and Henry C. Doby, Jr., for the Defendant, Pfeiffer College

PER CURIAM:

A statutory three-judge court was convened to consider this constitutional challenge to North Carolina statutes extending tuition grants and scholarships to students enrolled in church-related colleges. The challenge is not to the entire program in a vacuum but it is contended that sectarianism is so pervasive at Belmont Abbey College and Pfeiffer College that state tuition grants and scholarships to students at those institutions are in violation of the First Amendment. It is not contended that such pervasiveness is present at other church-related institutions, such as Duke University.

I.

NORTH CAROLINA'S PROGRAMS

North Carolina has three separate programs which channel state funds into tuition assistance for North Carolina residents attending independent colleges in North Carolina, including church-related ones.

A.

The first, enacted in 1971 (N.C.G.S. § 116-19, et seq.) was enacted as a result of a general study of higher education in North Carolina. The study resulted in some reformation of the system of state institutions and a recognition of the state's need to keep private and independent colleges in the state financially healthy and viable and open to North Carolina residents. It was recog-

nized that their tuition costs were relatively high and that many deserving North Carolina students could not afford to attend them.

Under the 1971 statutes, as amended, funds are granted to the private colleges in the state, including those with church relations, on the basis of the number of North Carolina resident students enrolled in them on a full time basis. These funds are disbursed by the North Carolina Board of Higher Education to individual colleges under contracts which obligate the colleges to use the funds for scholarship assistance to financially needy North Carolina resident students. To participate, a college must be accredited by the Southern Association of Colleges and Schools and must not be a "seminary Bible school, Bible college or similar religious institution." By an amendment adopted in 1975,[1] the scholarships may be granted only for secular education. By an amendment enacted in 1976[2] each recipient college must keep the funds received from the state in a separate, identificable account, and it must notify each scholarship recipient of the source of the funds. At the end of each year, any funds unused for the authorized purpose must be returned to the state. The current contracts between the Board and the colleges specifically exclude from scholarship eligibility any student pursuing a course of study primarily

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1. 1975 Session Laws, Chapter 875, § 30.

2. 1975 Session Laws, Second Session, Chapter 983, § 5½.(sic) [See § 56]

designed to prepare the student for a career in a religious vocation.

The principal officer of each participating institution is required to submit certificates and reports showing compliance with the requirements of the statutes, the Board's regulations and the contract provisions, including a certification that all of the funds are used for secular educational purposes only. The Board has required no post-year audits of the records of the colleges, but has required reports showing in detail the disbursement of the funds.

B.

Because of the higher tuition costs in private institutions, the growing enrollment in state institutions and the limitation of the 1971 program to scholarships for needy students, in 1975 there was enacted another tuition grant program.[3] Under this statute, the State Education Assistance Authority was authorized and directed to grant $200 for each academic year to each North Carolina resident attending a qualified college in North Carolina on a full time basis. The qualified colleges were the same as those qualified to participate in the 1971 scholarship program. Each qualified student attending an approved institution on a full time basis must apply for the tuition grant. The participating college then certifies the eligibility of each applying student, whereupon the Authority disburses to each ap-

3. 1975 Session Laws, Chapter 875, § 30.

proved college the sum of $200 multiplied by the number of eligible students enrolled on a full time basis in that institution. No cash is remitted to the students, but each participating student receives a credit of $200 on his bill, and the regulations require that each student receive notice of the tuition reduction. The statute provides that these funds may be used for secular educational purposes only, and the regulations specifically provide for the exclusion of any student enrolled in a program designed as preparation for a religious vocation.

The Authority has conducted post-year audits of seven participating colleges, including Belmont Abbey and Pfeiffer. The first of these was said to have taken one and one-half days, but later ones took as little as one-half day each. The procedure was said to be quick, mechanical and not judgmental.

C.

In 1975, the North Carolina legislature decided to participate in the federal program of "Grants to States for State Student Incentives".[4] Five Hundred Thousand Dollars ($500,000) in state funds were appropriated for its participating share for the year 1975-76, and $650,000 as its share for 1976-77.[5] These funds are administered by the State Education Assistance Authority, and they are avail-

4. 20 U.S.C.A. § 1070C, et seq.

5. 1975 Session Laws, Chapter 875, § 36.

able for scholarship grants to post-secondary school undergraduate students "on the basis of substantial financial need."[6] The Authority has contracted with College Foundation, Inc., a non profit institution, for administrative assistance in identifying eligible students with the greatest financial need.

In addition to showing greater financial need, a student applicant for assistance under this program must show that he is a resident of North Carolina and enrolled in an approved institution in that state, whether public or private, on a full time basis. Under North Carolina's regulations, no student pursuing a program of instruction designed as preparation for a religious vocation is eligible.

North Carolina's student selection criteria have been approved by the Federal Commissioner of Education.

II.

THE COLLEGES

In the organization and structure of the two colleges involved in these proceedings, there appears to be a pervasive sectarianism, but that sectarianism is not pervasively evident in their actual operation. The evidence shows them to be liberal arts colleges functioning in the liberal arts tradition. They are not engaged in proselytizing students or any one else.

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6. 20 U.S.C.A. 1070C-2(b)(3).

BELMONT ABBEY COLLEGE

Belmont Abbey College was founded by the Benedictine Monks of Belmont Abbey Monastery. The financial affairs of the Monastery are conducted by The Southern Benedictine Society, Inc., an eleemosynary corporation controlled by a Board of Trustees of whom three are appointed by the Abbot and three are elected by the Benedictine Monks of the Monastery. The Southern Benedictine Society, Inc. owns income producing properties. It maintains the Monastery and a cathedral; it pays for the living expenses of all members of the Abbey, and it makes charitable contributions.

The Southern Benedictine Society, Inc. is the owner of the entire campus occupied by Belmont Abbey College. It is leased, rent free, to Belmont Abbey College, Inc., which maintains the college buildings and campus and services any debt that may be placed upon any of the leased buildings. Belmont Abbey College, Inc. was organized by the Benedictines in 1960 to operate the college. It is governed by a self-perpetuating Board of Trustees. The by-laws provide that the Abbot and at least four other members of the Monastery must be members of the Board of Trustees of the college, but the Benedictines may not be more than 50% of the members of the Board of Trustees. The members of the Monastery must approve in writing the selection or removal of members of the Board of Trustees, any amendment to the by-laws of the college, the appointment of the college president, the adoption of any program of capital improvement or the

adoption of an operating budget with a deficit. Despite the broad veto powers of members of the Monastery, however, the written approval of the members of the Monastery of the trustees elected by the Board of Trustees has been routine and perfunctory.

Some members of the Abbey serve as administrators and members of the faculty of the college. Others serve the college in other capacities. Their salaries are comparable to those of others who are not members of the Abbey, but are paid, not to the individuals, but to The Southern Benedictine Society. When its income and expenses are totaled, The Southern Benedictine Association makes a partial remission of the salary receipts to the college. These contributions of money by The Southern Benedictine Society to the college are unrestricted. Over the past five years these approximate 7.5% of the income of the college.

Catholics predominate on the Board of Trustees, the offices of administration, faculty and staff of the college. Members of the Monastery may not now constitute more than 50% of the Board of Trustees, but all but one of the lay members are Catholic. At least ten of the fourteen administrators serving from the fall of 1971 to the spring of 1976 were Catholics. Catholic preponderance on the faculty is not so great, however, though more than a majority are Catholic. At least thirty of the fifty-two members of the faculty during the 1975-76 school year were Catholic, and half of those were members of the Monastery. Seventeen members of the faculty listed no religious

affiliation or preference, while five indicated affiliations with other Christian denominations. In the past, the faculty has included a Jewish Rabbi and an Islamic Moslem.

An applicant for a position on the faculty is not requested to disclose any religious preference or affiliation, and the members of the Monastery serving on the faculty have academic qualifications comparable to the rest of the faculty members.

The College does inquire about the religious affiliations and preferences of student applicants. In recent years approximately 70% of the students have been Catholic, while some fourteen other denominations or religions have been represented. Non-Catholics, however, have been favored in scholarships granted by the college. While 30% of the students were non-Catholic in 1975-76, 38% of the scholarship funds went to non-Catholics, and 47% of the recipient students were non-Catholic.

In addition to the nearby presence of the Monastery and cathedral, religious symbols abound in the college. The Benedictines go about in clerical garb. In several of the buildings there are crucifixes, crosses, and other religious art.

In the charter of the College, the fourth stated purpose speaks of Christian inspiration, fidelity to the Christian message and of reflection upon the growing treasury of human knowledge in the light of the Catholic faith. The fourth stated charter purpose is explained in the faculty handbook and College catalog in humanistic

terms. Beyond intellectual excellence, the College is concerned with the total development of the student and the contribution the student can make to the "entire human family." The students are to inquire into the meaning of their lives. As one student put it, "the Christian ideology which the College seeks to preserve is some sort of caring, compassionate concern for the human race."

Belmont Abbey College offers a broad liberal arts undergraduate program, with curriculum requirements to insure to each student a rather broad exposure. There are twenty-three academic departments, with permissible concentrations in sixteen. Theology is not one of the sixteen departments in which a student may seek a major.

Each student is required to take two courses in the Department of Theology. Three of the courses offered in that department, however, are not primarily concerned with the Christian religion. One is a comparative study of major world religions, while two others are concerned with ancient religions and mythology, though attention is given to their influence upon the Old Testament and Christianity. In 1975-76, a course in the Islamic religion was offered and taught by an Islamic Moslem. Moreover, the theology requirement can be fulfilled by transfer credits from other colleges, including public institutions. Finally, other courses concentrating primarily or entirely upon Christianity were taught as academic disciplines in which there was no appearance of an attempt to persuade the student to accept either Christian or Catholic doc-

trines.

There is no requirement that students attend religious services. The College has no rule against prayer in classrooms, and on rare occasions members of the faculty have opened classes with prayer. The norm, however, is that religion is not injected into the classroom, and when it is the subject of study in the Theology Department, the tone is that of the academician and not that of a spreader of the Gospel.

In general, there is academic freedom in the College. The College has adopted the 1940 Statement of Academic Freedom of the American Association of University Professors. The Faculty Handbook emphasizes the freedom of each member of the faculty to seek and impart knowledge, interpret findings and draw conclusions without interference because those conclusions are unacceptable to constituted authority within or without the institution. There is a stated limitation, however. There is to be no "dissemination of doctrines and views that are subversive to the basic principles of American political freedom and government or of the aims and purposes of the College as a Catholic institution***." This limitation is interpreted not to exclude objective examination even of the fundamental principles of Christian religion and of the government of the United States. One faculty member has interpreted the guidelines in the Faculty Handbook to mean that each faculty member is free to pursue the meaning and significance of serious disagreements in the human community, but is not free to seek converts to a political or religious view which thoroughly

counters those upon which the American people understand themselves to be based.

Each teacher selects his own textbooks.

PFEIFFER COLLEGE

Pfeiffer is a liberal arts college with affiliations with the United Methodist Church. It is governed by a self-perpetuating Board of Trustees, but the by-laws require that nine of them must be Methodist women, that six be Methodist ministers, and that 60% be Methodists from the Western North Carolina Conference. All persons elected by the Board to places as trustees must be confirmed by the Western North Carolina Conference, but such confirmation has been perfunctory. Since 1971 approximately 75% of the members of the Board of Trustees have been Methodist.

There is no evidence, however, that any Methodist agency has attempted to influence the governance of Pfeiffer College. The College makes no report of any kind to the United Methodist Church or any of its divisions or agencies. The current Vice President for Academic Affairs has experienced no attempt by the Methodist Church to influence any decision of his.

Pfeiffer's current President is a Methodist lay speaker with a background as a teacher of English and a college administrator. Approximately one-half of the other administrators are Methodists, while 40% of those faculty members expressing a religious preference stated a preference for the Methodist church.

Approximately 40% of the student body is Methodist. This is a probable consequence of the Methodist identification of the institution, the extensive use of Methodist ministers in recruiting students and the fact that some of Pfeiffer's privately established scholarship funds were established by Methodists, some of which impose religious restrictions upon the selection of recipients.

Pfeiffer is accredited by the Senate of the United Methodist Church. It derives approximately 6% of its revenues from divisions of that church, and Methodist ministers are utilized in the solicitation of private donations to the College. Methodist church groups have utilized the facilities of the College for workshops, conferences and sports. It grants honorary degrees to Methodists in disproportionate numbers, and Methodist officials, ministers and lay readers are invited to deliver commencement addresses, baccalaureate sermons and to speak in the "Supplementary Program."

There are references to God and the Church in Pfeiffer's charter, and there is a requirement that each candidate for its BA degree, the only degree it offers, have at least two courses in religion. It offers courses in sixteen academic fields, however, and every candidate for a degree must have had some courses in the humanities, in social sciences, and in natural sciences. The religion course requirement is part of the humanities requirement. Moreoever, each candidate for a degree must have 125 credits, out of a minimum of 1,000 required for graduation, in its "Supplemental Program." That program includes

offerings in cultural events, lectures and talks in a wide variety of topics, and religious services and programs. Religious services are offered regularly in the chapel, but attendance is not required, and the testimony shows that in the student body as a whole there is no unusual enthusiasm for Christian activities. Chapel attendance is poor.

Pfeiffer, however, does offer majors in religion, in Christian education and in church music. The religion major is designed for "pre-ministerial" students with the purpose of preparing them for graduate work in divinity schools. The majors in Christian education and in church music are designed to qualify graduates for careers in those fields. A student majoring in religion, in addition to required courses in religion and Christian education, is required to take courses in philosophy, English, history and a foreign language. In the student body there is a substantial number of pre-ministerial students, and a survey of Pfeiffer graduates indicated that 4.6% of them entered the ministry. Others are employed in other capacities in connection with religious work.

The courses in religion, but not those in Christian education or church music, are taught according to the academic requirements intrinsic to the subject matter. There is no evidence of attempts to propagate articles of Christian faith in those academic courses. Moreover, the religion requirement can be satisfied by transfer credits from other colleges.

Pfeiffer has adopted the 1940 Statement

of Academic Freedom of the American Association of the University Professors. Each member of the faculty selects the materials to be used in his course, and there is no evidence that the United Methodist Church or any other religious group has attempted to influence the content of any course or the method by which it is taught.

In addition to the religious services sponsored by the College, on the campus there is a Christian Life Council which coordinates religious activities on campus, including Bible studies, retreats and other worship opportunities. Students provide other spontaneous worship opportunities for each other. However, on campus there are numerous other organizations with secular purposes providing students with opportunities for secular activities. There is no evidence that any member of the faculty or administration has attempted to interfere with the student government in any matter associated with religion, religious beliefs or activities.

There is no rule against prayer in the classroom, and, in the exercise of academic freedom, an individual professor may elect to open a class with prayer.

III.

The criteria for determining the constitutionality of governmental aid to sectarian colleges are set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), where they were summarized:

First, the statute must have a

> secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster "an excessive government entanglement with religion."

Here the plaintiffs concede that North Carolina's three scholarship and tuition assistance programs have a secular legislative purpose. We are left to consider the other two prongs of the test; the primary effect of advancing or inhibiting religion and excessive entanglement of government with religion.

As to the primary effect criterion, it was said in Hunt v. McNair, 413 U.S. 734, 743 (1973):

> That aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

More specific guidelines are provided in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976), for the colleges here seem indistinguishable from the Catholic colleges involved in Roemer.

Maryland established a program of noncategorical grants to the state's private

colleges, some of which had religious affiliations. In Roemer that program was challenged insofar as it provided grants to four Catholic colleges, the contention being that the colleges were "constitutionally ineligible for this ***aid." A three-judge district court, after finding the facts extensively, concluded the four Catholic colleges were not "pervasively sectarian." The Supreme Court accepted the findings and agreed with the conclusion.

Among the characteristics of the Maryland colleges with which the Supreme Court was concerned in Roemer were the following:

> (1) Despite their formal affiliation with the Roman Catholic Church, the colleges are 'characterized by a high degree of institutional autonomy.' 426 U.S. at 755.
>
> (2) The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required. Id.
>
> (3) Mandatory religion or theology courses are taught at each of the colleges, primarily by Roman Catholic clerics, but these only supplement a curriculum covering 'the spectrum of a liberal arts program.' Id. at 756.
>
> (4) Some classes are begun with prayer . . . . There is no 'actual college policy' of encouraging the practice. Id.

(5) Some instructors wear clerical garb and some classrooms have religious symbols. Id.

(6) Apart from the theology department, . . . faculty hiring decisions are not made on a religious basis. Id. at 757.

(7) The great majority of students at each of the colleges are Roman Catholic, but . . . the student bodies 'are chosen without regard to religion.' Id.

As to those characteristics, there appears no material distinction between the Maryland colleges and Belmont Abbey and Pfeiffer College. In all of these schools there was a presence of religion, but each of them is a liberal arts college in which the inculcation of religion is not the primary purpose. Formal religious ties are present, but beyond the minimal requirement of courses in religion or theology, taught as academic exercises, religion is not forced upon the students. Their general liberal arts curricula are not designed to prepare students for service in a religious vocation, and students are neither required to accept a set of religious beliefs nor to practice religious rituals.

Since these colleges are not distinguishable from those with which the Supreme Court dealt in Roemer, we conclude that they are not so pervasively religious that their secular activities cannot be separated from their sectarian ones.

It would not be enough that the secular aspects of these institutions may be separated from the sectarian if the state specifically funded religious activities at these colleges. The North Carolina General Assembly not only has not undertaken to do that, it has imposed an express restriction that the funds be used only for secular educational purposes. The plaintiffs, however, question whether this has been observed in practice because both the Board of Governors and the North Carolina Educational Assistance Authority take the position that grants of student aid in the form of scholarships and tuition credits were, themselves, secular purposes so long as the aided student in an eligible college was not in a program of study designed as preparation for a career in a religious vocation.

When these funds are received from the state, the colleges have set them up in separate accounts for scholarship or tuition grants. Once the scholarships are awarded, however, and the scholarship and grant funds are credited to the accounts of the individual students, there is a bookkeeping transfer of the funds from the scholarship and tuition grant accounts to the general funds of the colleges. Since general funds are used to serve sectarian as well as the secular purposes of these colleges, the plaintiffs contend that Roemer is uncontrolling here.

This contention of the plaintiffs seems only a variant of the "recurrent argument" that secular aid indirectly but inevitably results in sectarian aid. This was clearly recognized in Roemer where it was said:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. 426 U.S. 736, 747.

That fact, nevertheless, was held not to be a basis for invalidating the aid. It is enough that the state does not directly aid the sectarian activities and purposes. Consequential and incidental benefits that flow from state assistance in serving its secular mission are unavoidable, but they do not invalidate the secular aid extended by the state.

The scholarship and tuition grants with which we are concerned primarily benefit the eligible students and their families. It serves the state's secular purpose in assisting a North Carolina resident student to attend a private college of his choice. Since the schools here are not pervasively religious and the students receiving assistance are not preparing for a religious vocation, the grant of tuition and scholarship assistance to them is a secular use.

Of course, the colleges receive a benefit from these funds. Without such funds they might have fewer students, be able to charge less tuition, or be forced to divert other resources to student aid. In either such event, the receipt of these funds may be said to free other college funds for sectarian purposes which, otherwise, might not be available. That, however, is the precise reasoning which the Supreme Court held in Roemer was insufficient for First

Amendment invalidation of the program.

The plaintiffs seem to concede that if, when the scholarships are awarded and the tuition credits made, the funds were transferred to restricted accounts for clearly defined secular purposes, the plans would be unassailable. Were that done, funds in the general account would be freed for sectarian use, funds which otherwise might not be available for those purposes. There is no difference in result, whether the transfer is to a restricted account or to the general fund.

Since a transfer of these funds to a restricted account would serve no useful practical purpose, it should be avoided, for policing the expenditure of such accounts would involve the state in the operation of the colleges to a greater extent than it now is. North Carolina is now "entangled" in the operation of these colleges only minimally. It requires a minimum number of reports and certificates, and the audits it has conducted have been short and objective. A requirement that the college keep its books on a basis which would disclose the ultimate use of the funds, and the state's auditing those accounts, would be a substantial increase in the state's involvement.

In considering whether Maryland was excessively involved in the operation of the Catholic colleges there, the Court in Roemer considered the characteristics and nature of the colleges, the form of the aid, the funding process and the potential for political divisiveness. Particular emphasis was placed upon the first factor.

Since we have determined that Belmont Abbey and Pfeiffer College are not pervasively sectarian, that the aid primarily benefits the students rather than the colleges, and that the funding process requires little state supervision, there is little need for extensive state surveillance of the secular activities being funded. As the Supreme Court noted in Roemer, secular activities, in general, may be funded without further inquiry, and we have found that scholarship grants and tuition credits to students are secular in purpose. Hence,we conclude that these programs are not constitutionally deficient because the state does not require bookkeeping disclosing the ultimate expenditure of all of the funds and state supervision of such bookkeeping.

Having concluded that these two colleges are not pervasively sectarian, that the state's purpose in providing the assistance is a secular one and the use of the funds is secular, and that there is no excessive entanglement of the state with religious activities, we conclude that these programs are unassailable under the First Amendment of the Federal Constitution.

(Filed March 30, 1977)

McMillan, District J., concurring:

If we were writing on a clean slate, I would hold the challenged programs to be invalid as contrary to the First Amendment requirement that government "make no law respecting an establishment of religion or prohibiting the free exercise thereof... ." Providing tax money to church supported schools to distribute for tuition is bound to have some effect upon the attitudes and practices of those schools in respect of religion. State subsidies started small but are increasing, and can before long, in furtherance of education, a perfectly legitimate state interest, become so large that the power to withdraw them will be the power to control the private schools they benefit.

Whether state aid tends to establish or disestablish religion is not material. The far-sighted framers of the First Amendment were fresh witnesses to the dangers of dominion of church over state or of state over church, and wanted America to have none of either.

Unfortunately, the Roemer decision requires lower courts to make judgments as to how much religion a school actually practices; if the school atmosphere is essentially secular, i.e., not "pervasively sectarian," the state can subsidize its students at will.

Judged by the Roemer standard, Pffeifer and Belmont Abbey are eligible for the state programs in question. The evidence

at the hearing demonstrates that despite their many trappings and insignia of religious orientation these schools are not "pervasively" religious in profession or practice; religion there is described as an "intellectual discipline" with humanistic overtones; and these private schools do little if any more to promote religion than do the state supported schools whose public sources of funds they avidly seek to tap.

On further reflection perhaps this is the only way church schools can survive; youth today does not appear to take to formal religious indoctrination any more readily than it did in former centuries. It is, however, disquieting to one who attended one church school, Presbyterian Junior College, helped organize another, St. Andrews, and, in a small way has helped support church schools for many decades, and who has long thought and still believes that their offerings to a busy world are worth preserving.

I agree completely with the Court's thorough, clear and accurate analysis of the facts and with the legal conclusions drawn from those facts, and with the view that the Belmont Abbey and Pffeifer situations can not be distinguished meaningfully from the situations dealt with in the Roemer case; and I agree that we are bound by that decision today.

Solely, therefore, in deference to what I consider to be controlling authority, but with tremendous reluctance in principle, I concur in the decision.

Woodrow W. Jones
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
Judge's Chambers
Rutherfordton 28139
March 25, 1977

Honorable Clement F. Haynsworth, Jr.
Chief Judge
United States Court of Appeals
Fourth Judicial Circuit
Greenville, South Carolina 29603

Re: No. C-C-76-131 - Michael Smith, et al. v. Board of Governfors of the University of North Carolina, et al.

Dear Judge Haynsworth:

I have received and read your fine opinion in the above entitled case and desire to advise that I concur in the decision and the opinion.

As I have advised you heretofore, I was of the personal opinion that the North Carolina statutes violate the establishment clause but in view of the recent Supreme Court decisions of Hunt v. McNair and particularly Romer v. Board of Public Works of Maryland, we have no choice other than to hold the statutes valid.

You have done an outstanding job in the opinion and I am happy to concur.

With best wishes, I am

Sincerely yours,

/s/Woodrow W. Jones

WWJ/es

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-131

MICHAEL SMITH, Plaintiff,
-vs-
THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, et al.,
Defendants.

JUDGMENT

In accordance with the opinion and decision of the three-judge court, filed on the 30th day of March, 1977,

IT IS ORDERED, that this action is dismissed.

Each side will bear its own costs and fees.

This 3rd day of May, 1977.

/s/ James B. McMillan
United States District Judge

(filed May 5, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. C-C-76-131 (FILED MAY 16, 1977)

MICHAEL SMITH, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, WENDELL G. DAVIS, and WOODROW WILSON ROBBINS,
Plaintiffs

vs.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; WILLIAM A. DEESE, JR., Chairman thereof, and IRWIN BELK, VICTOR S. BRYANT, HUGH CANNON, PHILIP G. CARSON, JULIUS CHAMBERS, T. WORTH COLTRANE, WAYNE A. CORPENING, DR. HUGH DANIEL, JR., JACOB H. FROELICH, JR., DANIEL C. GUNTER, GEORGE WATTS HILL, LUTHER H. HODGES, MRS. HOWARD HOLDERNESS, DR. WALLACE HYDE, WILLIAM A. JOHNSON, JOHN R. JORDAN, JR., ROBERT B. JORDAN, III., MRS. JOHN McCAIN, REGINALD McCOY, HUGH MORTON, J. AARON PREVOST, LOUIS T. RANDOLPH, JOSEPH J. SANSOM, JR., HARLEY SHUFORD, JR., M.A. SLOAN, DR. E. B. TURNER, DAVID J. WHICHARD, III, THOMAS J. WHITE, JR., GEORGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

D. WILSON, and GEORGE M. WOOD, Members thereof; WILLIAM CLYDE FRIDAY, President of the University of North Carolina; THE NORTH CAROLINA EDUCATION ASSISTANCE AUTHORITY; STAN C. BROADWAY, Executive Director thereof; and CHARLES F. GEORGE, JR., J. RUSSELL KIRBY, ROGER GANT, JR., VICTOR E. BELL, JR., EDWIN C. BAKER, MRS. CARRIE W. HARPER, WILLIAM H. PLEMMONS and BURKETTE RAPER, Members of the Board of Directors thereof; BELMONT ABBEY COLLEGE, INC., and PFEIFFER COLLEGE, INC.;

Defendants.

Plaintiffs Michael Smith, Americans United for Separation of Church and State, Wendell G. Davis and Woodrow Wilson Robbins hereby give notice of appeal to the Supreme Court of the United States from the final Judgment entered in this action on May 5, 1977.

Appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Walter H. Bennett, Jr.
WALTER H. BENNETT, JR.
Attorney for the Plaintiffs
700 Law Building
Charlotte, North Carolina
Telephone: 704-376-7461

AFFIDAVIT OF SERVICE

Walter H. Bennett, Jr., being first duly sworn, deposes and says:

1. I am attorney of record for Plaintiffs Michael Smith, Americans United for Church and State, Wendell G. Davis and Woodrow Wilson Robbins in this action.

2. On May 12, 1977, I served the foregoing Notice of Appeal to the Supreme Court of the United States on the defendants in this action by service on the following attorneys of record:

Mr. Joseph W. Grier, Jr.
Grier, Parker, Poe, Bernstein, Gage & Preston
Cameron Brown Bldg.
Charlotte, North Carolina
Attorney for Belmont Abbey College & Pfeiffer College

Mr. Andrew Vanore
Asst. Attorney General
P. O. Box 629
Raleigh, North Carolian
Attorney for Board of Governors of the University of North Carolina, its Chairman and Members; the North Carolina Education Assistance Authority, its Executive Director and Directors; and William Clyde Friday, President of the University of North Carolina

Mr. Basil L. Whitener
129 South Street
Gastonia, North Carolina
Attorney for Belmont Abbey College

Mr. Henry C. Doby, Jr.
Hill Building
Albemarle, North Carolina
Attorney for Pfeiffer College

3. Service on the aforenamed counsel of record for defendants was obtained pursuant to Rule 33(1) of the United States Supreme Court Rules, by depositing a copy of the foregoing Notice of Appeal in the United States mails, properly addressed as above set forth, with first class postage prepaid;

All on this 12th day of May, 1977.

/s/ Walter H. Bennett, Jr.
WALTER H. BENNETT, JR.

Subscribed and sworn to before me, a Notary Public in and for Mecklenburg County, North Carolina, this _____ day of May, 1977.

/s/_____
Notary Public

My commission expires:_____

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. C-C-76-131 (FILED Dec. 17, 1976)

MICHAEL SMITH, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, WENDELL G. DAVIS, AND WOODROW WILSON ROBBINS,

Plaintiffs,

versus

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; WILLIAM A. DEESE, JR., Chairman thereof; and IRWIN BELK, VICTOR S. BRYANT, HUGH CANNON, PHILIP G. CARSON, JULIUS CHAMBERS, T. WORTH COLTRANE, WAYNE A. CORPENING, DR. HUGH DANIEL, JR., JACOB H. FROELICH, JR., DANIEL C. GUNTER, GEORGE WATTS HILL, LUTHER H. HODGES, MRS. HOWARD HOLDERNESS, DR. WALLACE HYDE, WILLIAM A. JOHNSON, JOHN R. JORDAN, JR., ROBERT B. JORDAN, III, MRS. JOHN McCAIN, REGINALD McCOY, HUGH MORTON, J. AARON PREVOST, LOUIS T. RANDOLPH, JOSEPH J. SANSOM, JR., HARLEY SHUFORD, JR., M. A. SLOAN, DR. E. B. TURNER, DAVID J. WHICHARD, III, THOMAS J. WHITE, JR., GEORGE D. WILSON, and GEORGE M. WOOD, Members thereof; WILLIAM CLYDE FRIDAY, President of the University of North Carolina; THE NORTH CAROLINA EDUCATION ASSISTANCE AUTHORITY; STAN C. BROADWAY, Executive Director

thereof; and CHARLES F. GEORGE, JR., J. RUSSELL KIRBY, ROGER GANT, JR., VICTOR E. BELL, JR., EDWIN C. BAKER, MRS. CARRIE W. HARPER, WILLIAM H. PLEMMONS and BURKETTE RAPER, Members of the Board of Directors thereof; BELMONT ABBEY COLLEGE, INC.; and PFEIFFER COLLEGE, INC.,

Defendants.

O R D E R

It appearing to the undersigned United States Circuit Judge that he is disqualified from participating in the decision of this case because he has "any other interest" in the subject matter in controversy that would be substantially affected by the outcome of the proceeding, and that the disqualification cannot be waived; now, therefore, I recuse myself from further participation and request that the Chief Judge of the Circuit reconstitute the court. Attached to this order is a copy of my letter to Chief Judge Haynsworth explaining the nature of the interest that I deem to be disqualifying.

This 16th day of December, 1976.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

UNITED STATES COURT OF APPEALS
Fourth Judicial Circuit

December 16, 1976

Chambers of
J. Braxton Craven Jr.
United States Circuit Judge
Asheville, North Carolina 28802

Chief Judge Haynsworth

Re: Civ. No. C-C-76-131 - Michael Smith, et al. v. Board of Governors of the Univ. of N.C., et al. - Three-Judge Court - Charlotte Division

Dear Judge Haynsworth:

I refer to my telephone conversation with you this morning. You previously assigned me to participate as the circuit judge member of a three-judge court to consider and decide the above-captioned case. The court met in Charlotte, North Carolina, on December 1, 1976, and heard argument. During the course of the argument, I inquired of counsel whether my daughter, who is enrolled as a student at Duke University, would receive any credit under the challenged legislation, and Mr. Grier expressed the opinion that she would be entitled to it. In framing the question, I disclosed that I had paid $1,600 tuition for the first half year and had received no credit. By invoice dated December 6, 1976, but received by me some days later, I am advised by Duke University that the tuition for the spring semester is $1,615 reduced by a North

Carolina legislative grant in the amount of $100 and further reduced by a credit balance which I believe to be attributable to another legislative grant applicable to the prior semester in the additional amount of $100. I am thus benefitted by the legislation for the school year 1976-77 $200.

In In re Virginia Electric and Power Co., 539 F.2d 357 (1976), we agreed with the district court "that $70 to $100 cash in hand is not de minimis." 28 U.S.C. § 455 provides, inter alia, that a judge shall disqualify himself if he knows that he "has . . . any other interest that could be substantially affected by the outcome of the proceeding." It is perfectly clear that a decision holding the challenged legislation unconstitutional would cost me personally $200 per annum so long as my daughter is enrolled in a private college in North Carolina. 28 U.S.C. § 455 (e) further provides that no judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

I reluctantly conclude that I am disqualified by statute from participating in the decision of this case and that my disqualification is beyond the capacity of the parties to waive. By copies to my colleagues and to counsel, I express my regret and my apology for not perceiving my disqualification sooner and for occasioning unnecessary delay in deciding the question. I shall today forward to the Clerk of the United States District Court in Charlotte an order disqualifying myself. I regret very much that you

will now have to reconstitute the court.

Kindest regards.

Very sincerely yours,

/s/
J. Braxton Craven,Jr.

cc: Honorable Woodrow W. Jones,
Chief Judge
United States District Court
P.O. Box 741
Rutherfordton, North Carolina 28139

Honorable James B. McMillan
United States District Judge
Post Office & Courthouse
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Albemarle, North Carolina 28801

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. C-C-76-131

(Filed January 11, 1977)

Michael Smith, Americans United for Separation of Church and State, Wendell G. Davis, and Woodrow Wilson Robbins,

Plaintiffs,

versus

Board of Governors of the University of North Carolina; William A. Deese, Jr., Chairman thereof, and Irwin Belk, Victor S. Bryant, Hugh Cannon, Philip G. Carson, Julius Chambers, T. Worth Coltrane, Wayne A. Corpening, Dr. Hugh Daniel, Jr., Jacob H. Froelich, Jr., Daniel C. Gunter, George Watts Hill, Luther H. Hodges, Mrs. Howard Holderness, Dr. Wallace Hyde, William A. Johnson, John R. Jordan, Jr., Robert B. Jordan, III, Mrs. John McCain, Reginald McCoy, Hugh Morton, J. Aaron Prevost, Louis T. Randolph, Joseph J. Sansom, Jr., Harley Shuford, Jr., M. A. Sloan, Dr. E. B. Turner, David J. Whichard, III, Thomas J. White, Jr., George D. Wilson, and George M. Wood, Members thereof; William Clyde Friday, President of the University of North Carolina;

The North Carolina Education Assistance Authority; Stan C. Broadway, Executive Director thereof; and Charles F. George, Jr., J. Russell Kirby, Roger Gant, Jr., Victor E. Bell, Jr., Edwin C. Baker, Mrs. Carrie W. Harper, William H. Plemmons and Burkette Raper, Members of the Board of Directors thereof; Belmont Abbey College, Inc.; and Pfeiffer College, Inc.,

Defendants.

AMENDED DESIGNATION OF THREE-JUDGE COURT

It appearing that the Honorable J. Braxton Craven, Jr., United States Circuit Judge for the Fourth Judicial Circuit, will be unable to participate in the hearing of this case,

NOW, THEREFORE, I do vacate my designation of the Honorable J. Braxton Craven, Jr. to sit as a member of this three-judge court and instead do hereby designate myself to sit with the Honorable Woodrow W. Jones and the Honorable James B. McMillan, United States District Judges for the Western District of North Carolina, in the hearing and determination of the above entitled action as provided by law, the three to constitute a district court of three judges, as provided by Title 28 U.S.C.A. §2284.

This 7th day of January, 1977.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Judicial Circuit

NORTH CAROLINA GENERAL STATUTES
§§116-19 through 116-22, and
§§116-201 through 116-209.22

§ 116-19. Contracts with private institutions to aid North Carolina students. -- In order to encourage and assist private institutions to continue to educate North Carolina students, the Board of Governors of the University of North Carolina is hereby authorized to enter into contracts with the institutions under the terms of which an institution receiving any funds that may be appropriated pursuant to this section would agree that, during any fiscal year in which such funds were received, the institution would provide and administer scholarship funds for needy North Carolina students in an amount at least equal to the amount paid to the institution, pursuant to this section, during the fiscal year. Under the terms of the contracts the Board of Governors of the University of North Carolina would agree to pay to the institutions, subject to the availability of funds, a fixed sum of money for each North Carolina student enrolled at the institutions for the regular academic year, said sum to be determined by appropriations that might be made from time to time by the General Assembly pursuant to this section. Funds appropriated pursuant to this section shall be paid by the Department of Administration to an institution upon recommendation of the Board of Governors of the University of North Carolina and on certification of the institution showing the number of North Carolina students enrolled at the institution as of October 1 of any year for which funds may be appropriated. (1971,

c. 744, s.1; c. 1244, s. 5.)

§ 116-20. Scholarship and contract terms; base period. -- In order to encourage and assist private institutions to educate additional numbers of North Carolinians, the Board of Governors of the University of North Carolina is hereby authorized to enter into contracts within the institutions under the terms of which an institution receiving any funds that may be appropriated pursuant to this section would agree that, during any fiscal year in which such funds were received, the institution would provide and administer scholarship funds for needy North Carolina students in an amount at least equal to the amount paid to the institution, pursuant to this section, during the fiscal year. Under the terms of the contracts the Board of Governors of the University of North Carolina would agree to pay to the institutions, subject to the availability of funds, a fixed sum of money for each North Carolina student enrolled as of October 1 of any year for which appropriated funds may be available, over and above the number of North Carolina students enrolled in that institution as of October 1, 1970, which shall be the base date for the purpose of this calculation. Funds appropriated pursuant to this section shall be paid by the Department of Administration to an institution upon recommendation of the Board of Governors of the University of North Carolina and on certification of the institution showing the number of North Carolina students enrolled at the institution as of October 1 of any year for which funds may be appropriated over the number enrolled on the base date. In the event funds are

appropriated for expenditure pursuant to this section and funds are also appropriated, for the same fiscal year, for expenditure pursuant to G.S. 116-19, students who are enrolled at an institution in excess of the number enrolled on the base date may be counted under this section for the purpose of calculating the amount to be paid to the institution, but the same students may not also be counted under G.S. 116-19, for the purpose of calculating payment to be made under that section. (1971, c. 744, s.2; c. 1244, s. 5.)

§ 116-21. Contract forms; reports; audits; regulations. -- The Board of Governors of the University of North Carolina is authorized to prescribe the form of the contracts to be executed under G.S. 116-19 and 116-20, to require of the institutions such reports, statements and audits as the Board may deem necessary or desirable in carrying out the purposes of G.S. 116-19 through 116-22 and to make any rules or regulations that will, in the opinion of the Board, help to achieve the purposes of G.S. 116-19 through 116-22. (1971, c. 744, s.3; c. 1244, s. 5.)

§ 116-22. Definitions applicable to §§ 116-19 to 116-22. -- As used in G.S. 116-19 through 116-22:

(1) "Institution" shall mean an educational institution located in this State that is not owned or operated by the State of North Carolina or by an agency or political subdivision of the State or by any combination thereof, that is accredited by the Southern Association of Col-

leges and Schools under the standards of the College Delegate Assembly of said Association and that is not a seminary, Bible school, Bible college or similar religious institution.

(2) "Student" shall mean a resident of North Carolina in accordance with definitions of residency that may from time to time be adopted by the Board of Governors of the University of North Carolina and published in the residency manual of said Board; and a person who has not received a bachelor's degree, or qualified therefor, and who is otherwise classified as an undergraduate under such regulations as the Board of Governors of the University of North Carolina may promulgate. The enrollment figures required by G.S. 116-19 through 116-22 shall be the number of full-time equivalent students as computed under regulations prescribed by the Board of Governors of the University of North Carolina. (1971, c. 744, s. 4; c. 1244, s. 5.)

Article 23
State Education Assistance Authority.

§116-201. Purpose and definitions. -- (a) The purpose of this Article is to authorize a system of financial assistance, consisting of grants, loans, work-study or other employment, and other aids, for qualified residents of the State to enable them to obtain an education beyond the high school level by attending public or private educational institutions. The General Assembly has found and hereby de-

clares that it is in the public interest and essential to the welfare and well-being of the inhabitants of the State and to the proper growth and development of the State to foster and provide financial assistance to residents of the State, properly qualified therefor, in order to help them to obtain an education beyond the high school level. The General Assembly has further found that many residents of the State who are fully qualified to enroll in appropriate eudcational institutions for furthering their education beyond the high school level lack the financial means and are unable, without financial assistance as authorized under this Article, to pay the cost of such education, with a consequent irreparable loss to the State of valuable talents vital to its welfare. The General Assembly has determined that the establishment of a proper system of financial assistance for such objective purpose serves a public purpose and is fully consistent with the long established policy of the State to encourage, promote and assist the education of the people of the State.

(b) As used in this Article the following terms shall have the following meanings unless the context indicates a contrary intent:

(1) "Act or undertaking" or "acts or undertakings" shall mean bonds of the Authority authorized to be issued under this Article;
(2) "Authority" shall mean the State Education Assistance Authority created by this Article, or if the Authority shall be abolished, the board, body, commission or agency succeeding to the principal func-

tions thereof or on whom the powers given by this Article to the Authority shall be conferred by law;

(3) "Bond resolution" or "resolution" when used in relation to the issuance of bonds shall be deemed to mean either any such resolution or any trust agreement securing any bonds;

(4) "Bonds" or "revenue bonds" shall mean the bonds authorized to be issued by the Authority under this Article, which may consist of bonds, notes or other debt obligations evidencing an obligation to repay borrowed money and payable solely from revenues and other moneys of the Authority pledged therfor;

(5) "Eligible institution," with respect to loans shall have the same meaning as such term has in section 1085 of Title 20 of the United States Code;

(6) "Eligible institution," with respect to grants and work-study programs shall include all state-supported institutions of higher learning and all institutions organized and administered pursuant to Chapter 115A of the General Statutes and all private institutions as defined in subdivision (8) of this subsection;

(7) "Obligations" or "student obligations" shall mean student loan notes and other debt obligations evidencing loans to students which the Authority may take, acquire, buy, sell, endorse or guarantee under the provisions of this Article, and may include any direct or in-

direct interest in the whole or any part of any such notes or obligations;

(8) "Private institution" shall mean an institution other than a seminary, Bible school, Bible college or similar religious institution in this State that is not owned or operated by the State or any agency or political subdivision of the State or by any combination thereof, that offers post-high school education and is accredited by the Southern Association of Colleges and Schools, or in the case of institutions that are not eligible to be considered for such accreditation, accredited in such categories and by such nationally recognized accrediting agencies as the Authority may designate;

(9) "Student" shall mean a resident of the State, in accordance with definitions of residency that may from time to time be prescribed by the Board of Governors of the University of North Carolina and published in the residency manual of said Board, who, under regulations adopted by the Authority, has enrolled or will enroll in an eligible institution and who is making suitable progress in his education in accordance with standards acceptable to the Authority and who has not received a bachelor's degree, or qualified therefor, and is otherwise classified as an undergraduate under such regulations as the Authority may promulgate; and

(10) "Student loans" shall mean loans

to residents of this State to aid them in pursuing their education beyond the high school level. (1965, c. 1180, s.1; 1971, c. 392, s.1; c. 1244, s. 14.)

Applied in Nicholson v. State Educ. Assistance Authority, 275 N.C. 439, 168 S.E. 2d 401 (1969).

Cited in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576. 174 S.E. 2d 551 (1969).

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§ 116-202. Authority may buy and sell students' obligations; undertakings of Authority limited to revenues. -- In order to facilitate the vocational and college education of residents of this State and to promote the industrial and economic development of the State, the State Education Assistance Authority (hereinafter created) is hereby authorized and empowered to buy and sell obligations of students attending institutions of higher education or post-secondary business, trade, technical, and other vocational schools, which obligations represent loans made to such students for the purpose of obtaining training or education.

No act or undertaking of the Authority shall be deemed to constitute a debt of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds of the Authority. All such acts and undertakings shall contain on the face thereof a statement to the effect that neither the State nor the Authority shall be obligated to pay the same or the in-

terest thereon except from revenues of the Authority and that neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such acts and undertakings.

All expenses incurred in carrying out the provisions of this Article shall be payable solely from funds provided under the provisions of this Article and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this Article. (1965, c.1180, s.1; 1967, c. 955, s.1.)

Stated in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C.576, 174 S.E.2d 551 (1970).

§ 116-203. Authority created as subdivision of State; appointment, terms and removal of board of directors; officers; quorum; expenses and compensation of directors. --There is hereby created and constituted a political subdivision of the State to be known as the "State Education Assistance Authority." The exercise by the Authority of the powers conferred by this Article shall be deemed and held to be the performance of an essential governmental function.

The Authority shall be governed by a board of directors consisting of seven members, each of whom shall be appointed by the Governor. Two of the first members of the board appointed by the Governor shall be appointed for terms of one year, two for terms of two years, two for terms of three years, and one for a term of four years from the date of their appointment;

and thereafter the members of the board shall be appointed for terms of four years. Vacancies in the membership of the board shall be filled by appointment of the Governor for the unexpired portion of the term. Members of the board shall be subject to removal from office in like manner as are State, county, town and district officers. Immediately after such appointment, the directors shall enter upon the performance of their duties. The board shall annually elect one of its members as chairman and another as vice-chairman, and shall also elect annually a secretary, or a secretary-treasurer, who may or may not be a member of the board. The chairman, or in his absence, the vice-chairman, shall preside at all meetings of the board. In the absence of both the chairman and vice-chairman, the board shall appoint a chairman pro tempore, who shall preside at such meetings. Four directors shall constitute a quorum for the transaction of the business of the Authority, and no vacancy in the membership of the board shall impair the right of a quorum to exercise all the rights and perform all the duties of the Authority. The members of the board shall be entitled to reimbursement for their expenses incurred in attendance upon the meetings of the board or while otherwise engaged in the discharge of their duties. Each member of the board shall also be paid the sum of twenty-five dollars ($25.00) per day for each day or portion thereof during which he is engaged in the performance of his duties. Such expenses and compensation shall be paid out of the treasury of the authority upon vouchers signed by the chairman of the board or by such other person or persons as may be desig-

nated by the board for the purpose.(1965, c.1180, s.1.)

Quoted in State Educ. Assistance Authority v. Bank of Statesville, 276 NC. 576, 174 S.E.2d 551 (1970).

§ 116-204. Powers of Authority. -- The Authority is hereby authorized and empowered:

(1) To fix and revise from time to time and charge and collect fees for its acts and undertakings;
(2) To establish rules and regulations concerning its acts and undertakings;
(3) To acquire, hold and dispose of personal property in the exercise of its powers and the performance of its duties;
(4) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Article;
(5) To employ, in its discretion, consultants, attorneys, accountants, and financial experts, superintendents, managers and such other employees and agents as may be necessary in its judgment, and to fix their compensation to be payable from funds made available to the Authority by law;
(6) To receive and accept from any federal or private agency, corporation, association or person grants to be expended in accomplishing the objectives of the Authority, and to receive and accept from the State, from any municipality, county or

other political subdivison thereof and from any other source aid or contributions of either money, property, or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made;

(7) To sue and to be sued; to have a seal and to alter the same at its pleasure; and to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with law to carry into effect the powers and purposes of the Authority;

(8) To do all other acts and things necessary or convenient to carry out the powers expressly granted in this Article; provided, however, that nothing in this Article shall be construed to empower the Authority to engage in the business of banking or insurance. (1965, c.1180, s.1.)

Quoted in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

§ 116-205. Title to property; use of State lands; offices.--(a)Title to any property acquired by the Authority shall be taken in the name of the Authority.

(b) The State hereby consents, subject to the approval of the Governor and Council of State, to the use of any other lands or property owned by the State, which are deemed by the Authority to be necessary for its purposes.

(c) The Authority may establish such offices in state-owned or rented structures as it deems appropriate for its purposes. (1965,c.1180, s.1.)

§116-206. Acquisition of obligations.--With the proceeds of bonds or any other funds of the Authority available therefor, the Authority may acquire from any bank, insurance company or other lending institution, student obligations, or any interest or participation therein in such amount, at such price or prices and upon such terms and conditions as the Authority shall determine to be in the public interest and desirable to carry out the purposes of this Article. The Authority shall take such actions and require the execution of such instruments deemed appropriate by it to permit the recovery, in connection with any such obligations or any interest or participation therein acquired by the Authority, of the amount to which the Authority may be rightfully entitled, and otherwise to enforce and protect its rights and interest thereto. (1965, c. 1180, s.1; 1967, c. 955, s.2; 1971, c. 392, s.2.)

Quoted in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

§ 116-207. Terms of acquisitions.--The Authority shall prescribe the terms, conditions and limitations upon which it will acquire a contingent or direct interest in any obligation and such terms, conditions and limitations shall include, but without limiting the generality hereof, the interest rate payable upon such obligations, the maturities thereof, the terms for payment of principal and interest, applicable life or other insurance which may be required in connection with any such obligation and who shall pay the premiums thereon, the safekeeping of assets pledged to secure

any such undertaking, and any and all matters in connection with the foregoing as will protect the assets of the Authority. (1965, c. 1180, s.1.)

§ 116-208. Construction of Article.--The provisions of this Article shall be liberally construed to the end that its beneficial purposes may be effectuated. (1965, c.1180, s.1.)

§ 116-209. Trust fund established; use and investment of fund; duties of State Treasurer. --The appropriation made to the Authority under this Article shall be used exclusively for the purpose of acquiring contingent or vested rights in obligations which it may acquire under this Article; such appropriations, payments, revenue and interest as well as other income received in connection with such obligations is hereby established as a trust fund. Such fund shall be used for the purposes of the Authority other than maintenance and operation.

The maintenance and operating expenses of the Authority shall be paid from funds specifically appropriated for such purposes. No part of the trust fund established under this section shall be expended for such purposes.

The Authority shall be the trustee of the trust fund hereby created and shall have full power to invest and reinvest such funds, subject to the limitation that no investment shall be made, except upon the exercise of bona fide discretion, in securities which, at the time of making the investment, are, by statute, permitted for the investment of reserves of domestic life insurance companies. Subject to such

limitation, the Authority shall have full power to hold, purchase, sell, assign, transfer or dispose of, any of the securities or investments in which any of the funds created herein have been invested, as well as of the proceeds of such investments and any moneys belonging to such funds.

In lieu of exercising all of the powers hereunder with respect to the investment and reinvestment of the several funds, the Authority may delegate such powers to the State Treasurer, in which event the State Treasurer shall exercise the investment powers as prescribed herein.

The State Treasurer shall be the custodian of the assets of the Authority. All payments from the accounts thereof shall be made by him issued upon vouchers signed by such persons as are designated by the Authority. A duly attested copy of a resolution of the Authority designating such persons and bearing on its face the specimen signatures of such persons shall be filed with the State Treasurer as his authority for issuing warrants upon such vouchers. (1965, c. 1180, s.1.)

Editor's Note.--The appropriation referred to in this section is authorized to be made from the Contingency and Emergency Fund by s.2 of the act adding this Article.

Taxpayer Has No Standing to Seek Injunction Restraining Acts of Authority.--Since issuance of tax-exempt revenue bonds by the State Education Assistance Authority for purpose of financing loans to college students does not pledge the credit of the State or of any political subdivision thereof, a taxpayer can suffer no injury from the issuance of the bonds and has no

interest therein except his general interest as a member of the public in good government pursuant to the North Carolina Constitution, and, consequently, a taxpayer has no standing to seek an injunction restraining actions of the Authority and its fiscal agent relating to the issuance of the bonds and the expenditure of the proceeds thereof. Nicholson v. State Educ. Assistance Authority, 275 N.C. 439, 168 S.E.2d 401 (1969).

Allegation Insufficient Basis for Injunctive Relief.--The allegation that, by expressing its intent to issue a further series of bonds, the Authority has indicated that "additional tax funds will be expended" unless enjoined is not sufficient basis for injunctive relief, since this allegation is consistent with a contemplated use of funds appropriated from tax revenues for "lawful functions" of the Authority, such as the payment of salaries and expenses of employees engaged in the performance of functions authorized by this section. Nicholson v. State Educ. Assistance Authority, 275 N.C. 439, 168 S.E.2d 401 (1969).
Quoted in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

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§ 116-209.1. Provisions in conflict.--Any of the foregoing provisions of this Article which shall be in conflict with the provisions hereinbelow set forth shall be repealed to the extent of such conflict. (1967, c. 1177.)

Cited in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174

S.E. 2d 551 (1970).

§ 116-209.2. Reserves.--The Authority may provide in any resolution authorizing the issuance of bonds or any trust agreement securing any bonds that proceeds of such bonds may be used to establish reserve accounts in any trustee or banking institution or otherwise as determined by the Authority, for securing such bonds and facilitating the making of student loans and acquiring student obligations, to provide for the payment of interest on such bonds for such period of time as the Authority shall determine, and for such other purposes as will facilitate the issuance of bonds at rates of interest and upon terms deemed reasonable by the Authority and will, in the Authority's judgment, facilitate carrying out the purposes of this Article. (1967, c. 1177; 1971, c. 392, s. 3.)

§ 116-209.3. Additional powers.-- The Authority is authorized to develop and administer programs and perform all functions necessary or convenient to promote and facilitate the making and insuring of student loans and providing such other student loan assistance and services as the Authority shall deem necessary or desirable for carrying out the purposes of this Article and for qualifying for loans, grants, insurance and other benefits and assistance under any program of the United States now or hereafter authorized fostering student loans. There shall be established and maintained a trust fund which shall be designated "State Education Assistance Authority Loan Fund" (the "Loan Fund") which may be used by the Authority in making student loans directly or

through agents or independent contractors, insuring student loans, acquiring, purchasing, endorsing or guaranteeing promissory notes, contracts, obligations or other legal instruments evidencing student loans made by banks, educational institutions, nonprofit corporations or other lenders, and for defraying the expenses of operation and administration of the Authority for which other funds are not available to the Authority. There shall be deposited to the credit of such Loan Fund the proceeds (exclusive of accrued interest) derived from the sale of its revenue bonds by the Authority and any other moneys made available to the Authority for the making or insuring of student loans or the purchase of obligations. There shall also be deposited to the credit of the Loan Fund surplus funds from time to time transferred by the Authority from the sinking fund. Such Loan Fund shall be maintained as a revolving fund.

In lieu of or in addition to the Loan Fund, the Authority may provide in any resolution authorizing the issuance of bonds or any trust agreement securing such bonds that any other trust funds or accounts may be established as may be deemed necessary or convenient for securing the bonds or for making student loans, acquiring obligations or otherwise carrying out its other powers under this Article, and there may be deposited to the credit of any such fund or account proceeds of bonds or other money available to the Authority for the purposes to be served by such fund or account. (1967, c. 1177; 1971, c. 392, s.4.)

Sections 116-209.1 to 116-209.15 do not unconstitutionally authorize use of public funds. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576,

174 S.E. 2d 551 (1970).

It is expected that a student loan will inure to the private benefit of the person who obtains it. It is equally true that the education provided throughout the entire school system is intended to inure to the benefit of the individual who obtains it. However, the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of the paramount public purpose of encouraging education. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

Whether the student loan program is wise or unwise is for determination by the General Assembly. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E. 2d 551 (1970).

Assistance of Federal Government is Prerequisite to Functioning of Student Loan Program.--The assistance of the federal government and coordination with its program are prerequisite to the functioning of the North Carolina student loan program. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E. 2d 551 (1970).

And Only Loans Qualifying for Assistance under Federal Statutes May Be Made.--The only student loans the Authority is authorized to make or purchase are student loans which qualify under the federal statutes for federal assistance in respect of interest subsidy and guaranty. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E. 2d 551 (1970).

It is implicit in the provisions of §§ 116-209.1 to 116-209.15 that the General Assembly contemplated and intended that no loans would be made from the proceeds from

the sale of tax-exempt revenue bonds except student loans made in compliance with the standards prescribed by federal legislation and therefore qualified for assistance. Seemingly, the General Assembly realized that its specification of more precise standards for "student loans" might impede the functioning of the Authority and render it unable to qualify from time to time for the federal assistance upon which its program depended. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

The provisions of this section and §116-209.6 disclose that the General Assembly is well aware of the federal, State and private programs of low-interest insured loans to students in institutions of higher education and other post-secondary schools. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

Borrowers Unable to Make Payment until Completion of Education.--Persons who obtain "student loans" are unable to make payment on account of interest or principal until completion of their education by graduation or otherwise. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E. 2d 551 (1970).

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§ 116-209.4. Authority to issue bonds.--The Authority is hereby authorized to provide for the issuance, at one time or from time to time, of revenue bonds of the Authority in an aggregate principal amount outstanding at any time not exceeding fifty million dollars ($50,000,000). The bonds shall be designated, subject to such additions or changes as the Authority deems

advisable, "State Education Assistance Authority Revenue Bonds, Series.....," inserting in the blank space a letter identifying the particular series of bonds.

The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment. The bonds of each issue shall be dated, shall bear interest at such rate or rates, shall mature at such time or times not exceeding 30 years from their date or dates, as may be determined by the Authority, and may be made redeemable before maturity, at the option of the Authority, at such price or prices and under such terms and conditions as may be fixed by the Authority prior to the issuance of the bonds. Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. The Authority shall determine the form and the manner of execution of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had re-

mained in office until such delivery. The Authority may also provide for the authentication of the bonds by a fiscal agent. The bonds may be issued in coupon or in registered form, or both, as the Authority may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest, and for the interchange of registered and coupon bonds. The Authority may sell such bonds in such manner, either at public or private sale, and for such price as it may determine will best effectuate the purposes of this Article.

The Authority is authorized to provide in any resolution authorizing the issuance of bonds for pledging or assigning as security for its revenue bonds, subject to any prior pledge or assignment, and for deposit to the credit of the sinking fund, any or all of its income, receipts, funds or other assets, exclusive of bond proceeds and other funds required to be deposited to the credit of the Loan Fund, of whatsoever kind from time to time acquired or owned by the Authority, including all donations, grants and other money or property made available to it, payments received on student loans, such as principal, interest and penalties, if any, premiums on student loan insurance, fees, charges and other income derived from services rendered or otherwise, proceeds of property or insurance, earnings and profits on investments of funds and from sales, purchases, endorsements or guarantees of obligations, as defined in G.S. 116-201 hereof, and other securities and instruments, contract rights, any funds,

rights, insurance or other benefits acquired pursuant to any federal law or contract to the extent not in conflict therewith, money recovered through the enforcement of any remedies or rights, and any other funds or things of value which in the determination of the Authority may enhance the marketability of its revenue bonds. Money in the sinking fund shall be disbursed in such manner and under such restrictions as the Authority may provide in the resolution authorizing the issuance of such bonds. Unless otherwise provided in the bond resolution, the revenue bonds at any time issued hereunder shall be entitled to payment from the sinking fund without preference or priority of the bonds first issued. Bonds may be issued under the provisions of this Article without obtaining, except as otherwise expressly provided in this Article, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Article and the provisions of the resolution authorizing the issuance of such bonds.

The Authority is authorized to provide by resolution for the issuance of revenue refunding bonds of the Authority for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this Article, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if deemed advisable by the Authority, for making student loans or acquiring obligations under this Article.

The issuance of such revenue refunding bonds, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect to the same shall be governed by the provisions of this Article which relate to the issuance of revenue bonds insofar as such provisions may be appropriate. Revenue refunding bonds issued under this section may be sold or exchanged for outstanding bonds issued under this Article and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such outstanding bonds. (1967, c. 1177; 1971, c. 392, ss 5-7.)

Constitutionality.--The people of North Carolina constitute the State's greatest resource. Where bond proceeds are to be used solely to make loans to meritorious North Carolinians of slender means and thereby minimize the number of qualified persons whose education or training is interrupted or abandoned for lack of funds, the bond proceeds are used for a public purpose when used to make such loans. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E. 2d 551 (1970).

§ 116-209.5. Bond resolution.--The resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the Authority in relation to the purchase or sale of obligations, the making

of student loans, the insurance of student loans, the fees, charges and premiums to be fixed and collected, the terms and conditions for the issuance of additional bonds and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depositary of the proceeds of bonds, revenues or other money hereunder to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Any such resolution may set forth the rights and remedies of the bondholders and may restrict the individual right of action by bondholders. All expenses incurred in carrying out the provisions of such resolution may be treated as a part of the cost of administering this Article and may be payable, together with other expenses of operation and administration under this Article incurred by the Authority, from the Loan Fund.

In the discretion of the Authority, any bonds issued under the provisions of this Article may be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having powers of a trust company within or without the State. Such trust agreement or the resolution providing for the issuance of such bonds may pledge or assign the fees, penalties, charges, proceeds from collections, grants, subsidies, donations and other funds and revenues to be received therefor. Such trust agreement or resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the holders of such bonds as may be reasonable and proper and not in

violation of law, including covenants setting forth the duties of the Authority in relation to student loans, the acquisition of obligations, insurance, the fees, penalties and other charges to be fixed and collected, the sale or purchase of obligations or any part thereof, or other property, the terms and conditions for the issuance of additional bonds, and the custody, safeguarding and application of all moneys. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depositary of the proceeds of bonds, revenues or other money hereunder to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. Any such trust agreement or resolution may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the Authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of carrying out the purposes for which such bonds shall be issued.

In addition to all other powers granted to the Authority by this Article, the Authority is hereby authorized to pledge to the payment of the principal of and the interest on any bonds under the provisions of this Article any moneys received or to be received by it under any appropriation made to it by the General Assembly, unless the appropriation is restricted by the General Assembly to specific purposes of the Authority or such pledge is prohibited

by the law making such appropriation; provided, however, that nothing herein shall be construed to obligate the General Assembly to make any such appropriation. (1967, c. 1177; 1971, c. 392, s.8.)

§ 116-209.6. Revenues.--The Authority is authorized to fix and collect fees, charges, interest and premiums for making or insuring student loans, purchasing, endorsing or guaranteeing obligations and any other services performed under this Article. The Authority is further authorized to contract with the United States of America or any agency or officer thereof and with any person, partnership, association, banking institution or other corporation respecting the carrying out of the Authority's functions under this Article. The Authority shall at all times endeavor to fix and collect such fees, charges, receipts, premiums and other income so as to have available in the sinking fund at all times an amount which, together with any other funds made available therefor, shall be sufficient to pay the principal of and the interest on such bonds as the same shall become due and payable and to create reserves for such purposes. Money in the sinking fund, except such part thereof as may be necessary to provide such reserves for the bonds as may be provided for in the resolution authorizing the issuance of such bonds, shall be set aside in the sinking fund at such regular intervals as may be provided in such resolution and is hereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due and the redemption price or the purchase price of bonds retired by call or purchase as

therein provided. Such pledge shall be valid and binding from the time when the pledge is made. The fees, charges, receipts, proceeds and other revenues and moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. The resolution by which a pledge is created need not be filed or recorded except in the records of the Authority. The use and disposition of money to the credit of the sinking fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds. Any such resolution may, in the discretion of the Authority, provide for the transfer of surplus money in the sinking fund to the credit of the Loan Fund. Except as may otherwise be provided in such resolution, such sinking fund shall be a fund for all such bonds without distinction or priority of one over another. (1967, c. 1177.)

Cross reference.- See note to §116-209.3

§ 116-209.7. Trust funds.--Notwithstanding any other provisions of law to the contrary, all money received pursuant to the authority of the Article, whether as proceeds from the sale of bonds, sale of property or insurance, or as payments of student loans, whether principal, interest or penalties, if any, thereon, or as insurance premiums, or from the purchase or sale of obligations, or as any other receipts or

revenues derived hereunder, shall be deemed to be trust funds to be held and applied solely as provided in this Article. The resolution authorizing the bonds of any issue may provide that any of such money may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such money shall be deposited shall act as trustee of such money and shall hold and apply the same for the purposes hereof, subject to such regulations as this Article and such resolution may provide. (1967, c.1177.)

§ 116-209.8. Remedies.--Any holder of bonds issued under the provisions of this Article or any of the coupons appertaining thereto, except to the extent the rights herein given may be restricted by such resolution authorizing the issuance of such bonds, may either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the State or granted hereunder or under such resolution authorizing the issuance of such bonds, or under any contract executed by the Authority pursuant to this Article, and may enforce and compel the performance of all duties required by this Article or by such resolution to be performed by the Authority or by any officer thereof, including the fixing, charging and collecting of fees, charges and premiums and the collection of principal, interest and penalties, if any, on student loans or obligations evidencing such loans. The Authority may provide in any trust agreement securing the bonds that any such rights may be enforced for and on behalf of the holders of bonds by

the trustee under such trust agreement. (1967, c. 1177; 1971, c.392,s.9.)

§ 116-209.9. Negotiability of bonds.--All bonds issued under the provisions of this Article shall have and are hereby declared to have all the qualities and incidents, including negotiability, of investment securities under the Uniform Commercial Code of the State but no provision of such Code respecting the filing of a financial statement to perfect a security interest shall be deemed applicable to or necessary for any security interest created in connection with the issuance of any such bonds. (1967, c. 1177; 1971, c.392, s. 10.)

§ 116-209.10. Bonds eligible for investment.--Bonds issued by the Authority under the provisions of this Article are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds or obligations of the State is now or may hereafter be authorized by law. (1967, c. 1177.)

Whether tax-exempt revenue bonds issued under §116-209.4 should be approved for investment by fiduciaries and for deposit

"for any purpose for which the deposit of bonds or obligations of the State is now or may hereafter be authorized by law," as set forth in this section, is for determination by the General Assembly. Whether the purchase of these bonds is wise or unwise is for determination by the investor. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

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§ 116-209.11. Additional pledge.--Notwithstanding any other provision to the contrary herein, the Authority is hereby authorized to pledge as security for any bonds issued hereunder any contract between the Authority and the United States of America under which the United States agrees to make funds available to the Authority for any of the purposes of thisArticle, to insure or guarantee the payment of interest or principal on student loans, or otherwise to aid in promoting or facilitating student loans. (1967, c. 1177.)

§ 116-209.12. Credit of State Not Pledged.--Bonds issued under the provision of this Article shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the revenues and other funds provided therefor. Each bond issued under this Article shall contain on the face thereof a statement to the effect that the Authority shall not be obligated to pay the same nor the interest thereon except from revenues, proceeds and other funds pledged

therefor and that neither the faith and credit nor the taxing power of the state or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. Expenses incurred by the Authority in carrying out the provisions of this Article may be made payable from funds provided pursuant to this Article and no liability or obligation shall be incurred by the Authority hereunder beyond the extent to which moneys shall have been so provided. (1967, c. 1177)

Taxpayer has no standing to seek injunction restraining acts of Authority.--See same catch line in note under § 116-209. Quoted in State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

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§ 116-209.13. Tax exemption.--The exercise of the power granted by this Article in all respects will be for the benefit of the people of the State, for their well-being and prosperity and for the improvement of their social and economic conditions, and the Authority shall not be required to pay any taxes on any property owned by the Authority under the provisions of this Article or upon the income therefrom, and the bonds issued under the provisions of this Article, their transfer and the income therefrom (including any profits made on the sale thereof), shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes. (1967, c. 1177.)

Constitutionality. See State Educ. Assistance Authority v. Bank of Statesville 276 N.C. 576, 174 S.E. 2d 551 (1970). Cited in Stanley v. Department of Conservation and Development, 284 N.C. 15, 199 S.E. 2d 641 (1973).

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§116-209.14. Annual Report.--The Authority shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceeding year to the Governor and the General Assembly. Each such report shall set forth a complete operating and financial statement covering the operations of the Authority during such year. The Authority shall cause an audit of its books and accounts to be made at least once in each year by the State auditor or by certified public accountants. (1967, c. 1177.)

§ 116-209.15. Merger of Trust Fund.--The Authority may merge into the Loan Fund the Trust Fund established pursuant to G.S. 116-209 hereof and may transfer from such Trust Fund to the credit of the Loan Fund all money, investments and other assets and resources credited to such Trust Fund, for application and use in accordance with the provisions of this Article pertaining to the Loan Fund, including the power to pay expenses of the Authority from the Loan Fund to the extent that other funds are not available therefor. (1967, c. 1177.)

Applied in Nicholson v. State Educ. Assistance Authority, 275 N.C. 439, 168 S.E. 2d 401 (1969).

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§ 116-209.16. Other powers; criteria.--The Authority, in addition to all the powers more specifically vested hereunder, shall have all other powers necessary or convenient to carry out and effectuate the purposes and provisions of this Article, including the power to receive, administer and comply with the conditions and requirements respecting any gift, grant or donation of any property or money, any insurance or guarantee of any student loan or student obligations, any loans, advances, contributions, interest subsidies or any other assistance from any federal or State agency or other entity; to pledge or assign any money, charges, fees or other revenues and any proceeds derived by the Authority from any student loans, obligations, sales of property, insurance or other sources; to borrow money and to issue in evidence thereof revenue bonds of the Authority for the purposes of this Article and to issue revenue refunding bonds; to conduct studies and surveys respecting the needs for financial assistance of residents of the State respecting education beyond the high school level.

In carrying out the powers vested and the responsibilities imposed under this Article, the Authority shall be guided by and shall observe the following criteria and requirements, the determination of the Authority as to compliance with such criteria and requirements being final and conclusive:

(1) Any student loan, grant or other assistance provided by the Authority to any student shall be necessary to enable the student to pursue his education above the high school level; and

(2) No student loan, grant or other financial assistance shall be provided to any student by the Authority except in conformity with the provisions of this Article and to carry out the purposes hereof.

The Authority shall by rules and regulations prescribe other conditions, criteria and requirements that it shall deem necessary or desirable for providing financial assistance to students under this Article upon a fair and equitable basis, giving due regard to the needs and qualifications of the students and to the purposes of this Article. (1971, c. 392, s.11.)

§ 116-209.17. Establishment of student assistance program.--The Authority is authorized, in addition to all other powers and duties vested or imposed under this Article, to establish and administer a statewide student assistance program for the purpose of removing, insofar as may be possible, the financial barriers to education beyond the high school level for needy North Carolina undergraduate students at public or private institutions in this State. This objective shall be accomplished through a comprehensive program under which the financial ability of each student and of his family, under standards prescribed by the Authority, is measured against the reasonable costs, as determined by the Authority, of the educational program which the student proposes to pursue. Needs of students for financial assistance shall, to the extent of the availability of funds from federal, State, institutional or other sources, be met through work-study programs, loans, grants and out-of-term employment, or a combination of these forms of assistance. No student shall be

eligible to receive benefits under this student assistance program for a total of more than 45 months of full-time, post-high school level education. (1971, c. 392, s. 11.)

§ 116-209.18. Powers of Authority to administer student assistance program.-- In order to accomplish the purposes of this Article the Authority is authorized:

(1) To receive from the general fund or other sources such sums as the General Assembly may authorize from time to time for such purposes, and to receive from any other donor, public or private, such sums as may be made available, and to cause such sums to be disbursed for the purposes for which they have been provided;
(2) To establish such criteria as the Authority shall deem necessary or desirable for determining the need of students for grants under this Article, as opposed to other forms of financial assistance, and for deciding who shall receive grants;
(3) To prescribe the form and to regulate the submission of applications for assistance and to prescribe the procedures for considering and approving such applications;
(4) To provide for the making of, and to make, grants under this Article under such terms and conditions as the Authority shall deem advisable;
(5) To encourage educational institutions to increase the resources available for financial assistance; to prescribe such formulas for institutional maintenance of effort as the Authority may determine to be

consistent with the purposes of this Article;
(6) To provide by contract for the administration of all or any portion of the student assistance program by nonprofit organizations or corporations, pursuant to regulations and criteria established by the Authority;
(7) To serve, on designation by the Governor, or as may otherwise be provided by federal law, as the State agency to administer such statewide programs of student assistance as shall be established from time to time under federal law; and
(8) To have all other powers and authority necessary to carry out the purposes of the student assistance program, including, without limitation, all the powers given to the Authority by G.S. 116-204 and by other provisions of the General Statutes. (1971, c. 392, s. 11.)

§ 116-209.19. Grants to students.-- The Authority is authorized to make grants to students enrolled or to be enrolled in eligible institutions in North Carolina out of such money as from time to time may be appropriated by the State or as may otherwise be available to the Authority for such grants. The Authority, subject to the provisions of this Article and any applicable appropriation act, shall adopt rules, regulations and procedures for determining the needs of the respective students for grants and for the purpose of making such grants. The amount of any grant made by the Authority to any student, whether enrolled or to be enrolled in any private

institution or any tax-supported public institution, shall be determined by the Authority upon the basis of substantially similar standards and guides that shall be set forth in the Authority's rules, regulations and procedures; provided, however, that grants made in any fiscal year to students enrolled or to be enrolled in private institutions may be increased to compensate, in whole or in part, for the average annual State appropriated tuition subsidy for such fiscal year, determined as provided herein. The average annual State appropriated subsidy for each fiscal year shall be determined by the Advisory Budget Commission, after consultation with the Secretary of Administration, Board of Governors of the University of North Carolina and the Authority, for each of the two categories of tax-supported institutions, being (i) institutions, presently 16, that provide education of the collegiate grade and grant baccalaureate degrees and (ii) institutions, such as community colleges and technical institutes created and existing under Chapter 115A of the General Statutes. The average annual State appropriated subsidy for each of such two categories of institutions shall mean the amount of the total appropriations of the State for the respective fiscal years under the current operations budgets, pursuant to the Executive Budget Act reasonably allocable to undergraduate students enrolled in such institutions exclusive of the Division of Health Affairs of the University of North Carolina and the North Carolina School of the Arts for all institutions in such category, all as shall be determined by the Advisory Budget Commission after consulation as above provided, divided by the budgeted

number of North Carolina undergraduate students to be enrolled in such fiscal year.

The Authority in determining the needs of students for grants, may give consideration to, among other factors, the amount of other financial assistance that may be available to such students such as nonrepayable awards under the educational opportunity grant program and Health Professions Education Assistance Act. (1971, c. 392, s. 11; c. 1244, s. 14; 1975, c. 879, s.46.)

Editor's note. --The 1975 amendment, effective July 1, 1975, substituted "Secretary of Administration" for "State Budget Officer" in the fourth sentence of the first paragraph.

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§ 116-209.20.- Public purpose. -- No expenditure of funds under this Article shall be made for any purpose other than a public purpose. (19__, c. 392, s. 11.)

§ 116-209.21. Cooperation of the Board of Governors of the University of North Carolina.-- The Board of Governors of the University of North Carolina shall provide the secretariat for the Authority. The Executive Director of the Authority, who shall be its principal executive officer, shall be elected by the Board of Directors of the Authority on nomination of the President of the University of North Carolina. (1971, c. 392, s. 11; c. 1244, s. 14.)

§ 116-209.22. Constitutional construction. --The provisions of this Article are severable, and if any of its provisions shall

be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions. (1971, c.392, s. 11.)

NORTH CAROLINA SESSION LAWS - 1975

CHAPTER 875: § 30. Funds appropriated in this act to the Board of Governors of The University of North Carolina for aid to private colleges shall be disbursed in accordance with the provisions of G.S.116-19, G.S. 116-21, and G.S. 116-22. These funds are intended to provide up to two hundred dollars ($200.00) per full-time equivalent North Carolina undergraduate student enrolled at a private institution as of October 1 each year.

In addition to any funds appropriated pursuant to G.S. 116-19 and in addition to all other financial assistance made available to private educational institutions located within the State, or to students attending such institutions, there is hereby granted to each full-time North Carolina undergraduate student attending an approved institution, as defined in G.S. 116-22, the sum of two hundred dollars ($200.00) per academic year, which shall be distributed to the student as hereinafter provided.

The tuition grants provided for herein shall be administered by the State Education Assistance Authority pursuant to rules and regulations promulgated by the State Education Assistance Authority not inconsistent with this act. The State Education Assistance Authority shall not approve any grant until there has been received from an appropriate officer of the approved institution a certification that the student applying for said grant is an eligible student. Upon receipt of such certification, in proper form, the State Education Assistance Authority shall remit, at such times as it shall prescribe, said grant to the approved institution on

behalf and to the credit of such student.

In the event a student on whose behalf a grant has been paid shall not be enrolled and carrying a minimum academic load as of the tenth classroom day following the beginning of the school term for which such grant was paid, the institution shall refund to the State Education Assistance Authority the amount of grant paid on behalf of such student for such term. Each approved institution shall be subject to examination by the State Auditor for the purpose of determining whether such institution has properly certified eligibility and enrollment of students and credited grants paid in the behalf of such students.

In the event there are not sufficient funds to provide each eligible student with a full grant, each eligible student shall receive a reduced but equal share of funds then available for the remainder of the academic year within the fiscal period covered by the current appropriation.

Expenditures made pursuant to this section shall be used for secular educational purposes only. If any provision of this section or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

CHAPTER 875: § 36. Of the amount appropriated in Section 2 to the Board of Governors for related educational programs, five hundred thousand dollars ($500,000) for 1975-76 and six hundred fifty thousand dollars ($650,000) for 1976-77 and

any matching federal funds shall be used by the State Education Assistance Authority to establish a North Carolina incentive grants program for financial aid to needy North Carolina undergraduate students enrolled in post-secondary education institutions in North Carolina.

CHAPTER 983: § 54. (Refers to community college allocations.)

CHAPTER 983: § 56. (Aid to private colleges/limitation) Section 30 of the 1975 Session Laws Chapter 875 contains limitations and directions that apply to appropriations to the Board of Governors of the University of North Carolina for aid to private colleges. All of the limitations and directions of Section 30 of the 1975 Session Laws Chapter 875 shall apply to appropriations in this for aid to private colleges. As an additional limitation the funds for private colleges shall be placed in a separate, identifiable account in each eligible institution's budget/chart of accounts. All funds in this account shall be provided as scholarship funds for needy North Carolina students during the fiscal year, with any remaining funds to revert to the General Fund. Each student awarded a scholarship from this account shall be notified of the source of the funds and of the amount of the award.